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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

MECHANISED CONSTRUCTION OF PAKISTAN LTD.,

Petitioner,

vs.

AMERICAN CONSTRUCTION MACHINERY & EQUIPMENT LTD.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

DUNN & ZUCKERMAN
Attorneys for Petitioner
17 Battery Place
New York, New York 10004
(212) 943-5828

Of Counsel:
PETER M. BELLSEY

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QUESTIONS PRESENTED

1. Can the Courts of this Nation properly confirm into a judgment a Foreign Arbitral Award pursuant to a treaty which specifically provides for no such confirmation when a Court of competent jurisdiction has decreed that the arbitration proceedings are null and void prior to the holding of any evidentiary hearings or the issuance of such an Award?

2. In like manner, when the same Convention on Enforcement of Foreign Arbitral Awards specifically provides that no contracting state must confirm an Award into a judgment when the arbitrator has exceeded his authority, and when a Court of competent jurisdiction has held this to be the case in a timely manner, can a Court in the United States subsequently still elect to render a judgment on the basis of such a critically

deficient arbitral award?

3. Can an arbitrator make an ex parte determination under these circumstances that he has still retained proper jurisdiction over the parties and is free to ignore a choice of law provision contracted between the parties and render an Award in contravention thereof and still have such an Award judicially recognized and confirmed into a judgment by the Courts of the United States?

4. Is it not a matter of fundamental importance when courts in the United States elect to disregard a timely judgment of a court of competent jurisdiction in a friendly foreign state in favor of giving credence to an ex parte determination of an international dispute by an Irish arbitrator sitting in Geneva, Switzerland in favor of a Cayman Islands corporation?

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SUPREME COURT OF THE UNITED STATES

MECHANISED CONSTRUCTION OF PAKISTAN, LTD.,

Petitioner,

v.

AMERICAN CONSTRUCTION MACHINERY & EQUIPMENT CORPORATION LTD.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Mechanised Construction of Pakistan, Ltd. respectfully prays that a writ of certiorari issue to review the order and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on September 14, 1987. That opinion affirmed a judgment in favor of Respondent by the District Court on

the basis of written and documentary submissions by the parties granting Respondent a confirmation into a judgment of an arbitration award issued in Geneva, Switzerland.

OPINIONS BELOW

The opinion of the Court of Appeals from which this appeal is taken appears in the Appendix to this Petition at A1. The opinion rendered by the District Court for the Southern District of New York (John F. Keenan, U.S. District Judge) appears at A3.

JURISDICTION

The judgment and opinion of the Court of Appeals was entered on or after September 14, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATUTES INVOLVED

Section 201 of the Arbitration Act, 9 U.S.C. Section 201 provides as follows:

> §201. Enforcement of Convention
>
> The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall be enforced in United States courts in accordance with this chapter.

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1970) 3 U.S.T. 2517, TIAS No. 6997 provides in pertinent part in Article V as follows:

> 1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:
>
> (a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
>
> (c) The award deals with a difference not contemplated by or

not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

STATEMENT OF THE CASE

This action arose from Petitioner Mechanised Construction of Pakistan Ltd.'s ("MCP") entry into a Purchase and Supply Agreement with Respondent American Construction Ltd. ("ACME") on or about

January 6, 1987. MCP at that time was in the process of providing extensive construction services to two major projects both located in Iraq and sought to utilize the services of ACME in order to inter alia obtain certain construction machinery required to perform this task. A copy of the initial Agreement is set forth at A82.

In the ensuing months, differences between the parties arose and a Supplementary Agreement in resolution of such disputes was therefore executed on or about May 22, 1978. A copy of said Supplementary Agreement appears at A72. Unlike the original Agreement which provided for arbitration before the International Chamber of Commerce in Paris or Geneva at Section 9 thereof (A85), the Supplementary Agreement inter alia provided at Clause 10 that it should override and prevail with respect to the pro-

visions of the original Agreement in the event of any conflict (A79). The Supplementary Agreement further provided that it, as well as the original Agreement, "shall be governed by and be interpreted in accordance with the laws in Pakistan." (A79-A80)

Approximately one year later in May of 1979, ACME filed a demand for arbitration with the International Chamber of Commerce. Within one month's time, Petitioner MCP submitted a reply statement setting forth preliminary objections to such arbitration demand, including a reference to the applicable law as being that of Pakistan and that the arbitration clause contained in the January 6, 1977 Agreement was subject to the provisions of the Supplementary Agreement of May 27, 1978. Nonetheless, Max Abrahamson was appointed sole arbitrator by the ICC on

or about September 19, 1979.

Notwithstanding the fact that its counsel apparently executed terms of reference on or about March 19, 1980, MCP on July 27, 1980 sent further notice of its objections to the arbitration proceedings to arbitrator Max Abrahamson and Respondent ACME on the grounds that the proceedings were invalid in accordance with the law of Pakistan which was controlling. On September 1, 1980, arbitrator Abrahamson elected to reject MCP's objections to the invalidity of the proceedings before him. Petitioner MCP, with its principal place of business at Lahore, Pakistan, timely filed a petition in the Civil Court of Lahore on September 7, 1980 seeking a declaratory judgment against both ACME and arbitrator Abrahamson to the extent that the original arbitration clause in the January 6, 1977

Agreement was null and void and that the arbitration proceedings themselves had no jurisdictional basis. Both ACME and Max Abrahamson were duly served with said process and elected not to respond thereto.

In an ensuing ex parte proceeding before the Senior Civil Judge at Lahore, an order was issued on January 13, 1981 (A51) declaring inter alia that the arbitration clause in the original contract was "invalid, void, ineffective, inoperative and of no legal effect (A63) and did not confer any right upon ACME to proceed with the arbitration before the ICC and arbitrator Abrahamson. The order of the Court also declared that arbitrator Abrahamson "has no power to proceed with arbitration referred to him under the invalid clause of the Agreement dated 6 January 1977 and the arbitration pro-

ceedings so far conducted by him under rules of ICC Court of Arbitration are void ab initio without jurisdiction and of no legal consequence". (A63-A64). Up to this point in time, there had been no evidentiary hearings in the arbitration proceedings and, of course, no Award had been issued.

Subsequently, on June 1st and June 2nd of 1981, with prior notice of the outstanding declaratory judgment of the Civil Court at Lahore, Pakistan in hand, arbitrator Abrahamson proceeded to conduct hearings at which only Respondent ACME and its counsel attended for purposes of presenting evidence. Arbitrator Abrahamson then proceeded on this ex parte basis to make his deliberations which resulted in the issuance on or about May 24, 1982 of an arbitration award (A20)

in favor of ACME against MCP in the principal amount of $1,402,924 plus interest thereon at the rate of 17% per annum from December 22, 1981, as well as assessing arbitration and legal costs against MCP in the further amount of $132,557.57.

A significant basis of the award of arbitrator Abrahamson, a barrister practicing in Dublin, Ireland, is his determination that under the law of Pakistan the Supplementary Agreement (A72) was invalid and the Civil Court at Lahore was not properly seized with jurisdiction over the case when it issued its declaratory judgment because of subject matter limitations. On or about May 17, 1985, Respondent ACME filed a petition to confirm arbitrator Abrahamson's award against MCP in the United States District Court for the Southern District of New York on the basis of the Convention on the

Recognition and Enforcement of Foreign Arbitral Awards ("Convention").

After MCP's jurisdictional objections were duly dismissed by said District Court, MCP timely filed its answer which inter alia duly incorporated certain defenses accorded, pursuant to Article V(1)(a), (c) and (e) and 2(b). The proceedings before the District Court consisted primarily of written submissions, including an affidavit subscribed to by Ashtar Ausaf Ali on June 2, 1986 (A65). Mr. Ali, a licensed attorney in Pakistan and Professor at the University of Punjab Law College in Lahore, duly refuted as erroneous the conclusions with respect to the status of the law of Pakistan and the jurisdiction of the Civil Court at Lahore made by arbitrator Abrahamson at paragraphs 7 through 12 in his subject arbitration award.

On March 23, 1987 District Judge John F. Keenan rendered an opinion and order granting ACME's petition to confirm the arbitration award into a judgment, pursuant to the terms of the Convention. Subsequently, on September 14, 1987 in a per curiam one paragraph decision, the U.S. Court of Appeals for the Second Circuit duly affirmed that District Court order.

REASONS FOR GRANTING THE WRIT

This case involves a question of apparent first impression with respect to its underlying factual background. If the previously rendered decisions of the court below are allowed to retain their precedent setting status, it shall have the effect of according to foreign arbitral awards, demonstrably improperly obtained, a greater degree of enforceability

and effect than judgments of courts of foreign states.

In the process of leaving this situation intact should certiorari be denied herein, a precedent will also remain unchallenged that the specific defenses accorded to respondents under Article V of the Convention at Sections 1(a), (c), (e) and 2(b) are subject to an unduly burdensome restrictive interpretation at best, or more likely, are to be accorded no consideration whatsoever by courts in this country.

This was clearly not the intent of the framers of the Convention. Such a precedent would serve to create in the international arbitral mechanism as interpreted in the United States a super juridicial method for enforcing legal redress which goes beyond the scope of ordinary judicial proceedings even when the underlying arbitration proceedings

are inherently defective.

Equally important, Petitioner MCP is an instrumentality of a foreign sovereign state as defined by the Foreign Sovereign Immunities Act, 28 U.S.C. §1602 et seq in that it is a limited liability company with all shares owned by the Republic of Pakistan. The infringement or non-recognition of the full extent of the rights which should be accorded to such an instrumentality of a foreign sovereign under the express terms of the Convention could have dramatic political repercussions in the external relations of the U.S. Government vis-a-vis Pakistan. As such, the issues presented in this petition are of great importance not only to the extent that they shall create a precedent in a previously unexplored but vital area of the law, but also because the ultimate outcome of this litigation could have foreign policy ramifications.

With respect to this former point, if arbitration becomes an increasingly widely used medium for the resolution of legal disputes in the international commercial community, parties consenting to such arbitration need to be fairly apprised in advance of the full extent of the rights accorded to them under the Convention. With respect to the latter issue raised in the preceding paragraph, it should be borne in mind that the Islamic Republic of Pakistan was never a signatory to the Convention, and notwithstanding the interpretation of a court of competent jurisdiction in Pakistan that MCP had no obligation to arbitrate in accordance with Pakistani law, which the parties had incorporated as operable with respect to both the initial Contract and the Supplementary Agreement, important public policy considerations warrant the issuance of

certiorari herein. This court duly noted in Magnum Import Co. v. De Spoturno Coty, (1923) 262 U.S. 159, 67 L Ed 922, 43 S.Ct 531 that certiorari was properly granted in cases involving questions of importance which it is in the public interest to have decided by this court of last resort. That ruling echoed the sentiments previously set forth in Fields v. U.S., (1907) 205 U.S. 292, 516 Ed 807, 27 S.Ct 543 where the court noted at 205 U.S. 295:

> This court has uniformly held that its power in certiorari is one which should be sparingly exercised, and only when the circumstances of the case satisfied the court that the importance of the question involved, the necessity of avoiding conflict between two or more courts of appeal, or between courts of appeal and the courts of a state, or some matter affecting the interests of the nation in its internal or external relations demands such exercise.

Two of these four separate and distinct basis for the granting of the writ exist in the instant litigation.

In Ex Parte Lau Ow Bew, (1891) 141 U.S. 583, 35 L Ed 868, 12 S.Ct 43, the petitioner sought the issuance of a writ of certiorari on the basis of similar facts as are present herein in terms of their general application. The petitioner was a natural born subject of the Emperior of China who emigrated to the U.S. for the subsequent seventeen years. During this time, he was domiciled in Portland, Oregon and engaged in a wholesale and importing business. In September of 1890, he left the United States to temporarily visit his relatives in China with the intention of returning to the United States as soon as possible.

Prior to the petitioner's departure, he procured evidence of his status as an American merchant in accordance with

applicable U.S. regulations. When he presented such proofs to the authorities in San Francisco upon his return from China in August of 1881, he was refused permission to re-enter this country on the grounds that he had neglected to produce a necessary certificate from the Chinese Government required by a treaty executed between China and the United States in 1882 and amended in 1884. Petitioner Lau Ow Bew's application for a writ of habeas corpus to obtain his entry into this country was denied by the District Court and the Court of Appeals which also refused to certify any question of law to the U.S. Supreme Court. Petitioner Lau Ow Bew then sought a writ of certiorari from this tribunal. Chief Justice Fuller delivered the opinion of the court issuing the writ of certiorari and noting in pertinent part at 141 U.S. 587 as follows:

> It is evident that it is solely questions of gravity and importance that the Circuit Courts of Appeals should certify to us for instruction; and that it is only when such questions are involved that the power of this court to require a case in which the judgment and decree of the Court of Appeals is made final, to be certified, can be properly invoked. The inquiry upon this application, therefore, is whether the matter is of sufficient importance in itself, and sufficiently open to controversy, to make it the duty of this court to issue the writ applied for in order that the case may be reviewed and determined as if brought here on appeal or writ of error.

The Chief Justice then opined at 141 U.S. 588 as follows:

> The status of domicil in respect of natives of one country domiciled in another is a matter of international concern, and the acts of Congress are to be considered, in view of general and settled principles upon that subject, in arriving at a conclusion as to the operation upon the treaties with China, designed by Congress in those enactments. Was it intended that commercial domicil should be

> forfeited by temporary absence at the domicil or origin, and to subject resident merchants to loss of rights guaranteed by treaty if they failed to produce from the domicil of original that evidence which residence in the domicil of choice may have rendered it difficult, if not impossible, to obtain? We refrain from particular examination of the point involved, and refer to it only so far as necessary to indicate its importance.

As noted, on this basis, certiorari was granted. Chief Justice Fuller again alluded to Lau Ow Bew supra in his subsequent opinion for the court re Woods, (1892) 143 U.S. 202 36 L. Ed 125 12 S.Ct 417 at 143 U.S. 206 in the following manner:

> In the matter of Lau Ow Bew, the construction of Acts of Congress in the light of treaties with a foreign government, and status of domicil in respect of natives of one country domiciled in another, a matter of international concern, were brought under consideration upon the record, and we were of opinion

> that the grounds of the application were sufficient to call for our interposition.

This tribunal, in apparent recognition of the growing importance of arbitration in the international community has recently seen fit to grant certiorari on two occasions. Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, 105 S.Ct 3346 (1985), a controversy involving the arbitrability of antitrust disputes in a foreign forum, the court duly granted certiorari. In like manner, in Shearson/ American Express Inc. v. McMahon S.Ct (1987), the court again granted certiorari to review the enforceability of arbitration agreements between brokerage firms and their customers and whether claims arising thereunder involving the Racketeer Influenced and Corrupt Organization Act ("RICO"), 18 U.S.C. §1961 et seq are also arbitrable.

It is duly recognized by the Petitioner herein that there exists a long standing tradition of courts since the enactment of the Federal Arbitration Act, 9 U.S.C. §1 et seq not only to refer disputes to arbitration if the parties have so consented, but also to overturn arbitration awards subsequently issued in only extremely limited circumstances. Commentators have duly discoursed at great length that the Convention promotes a similar albeit not identical policy.[1/]

1/ American Bar Association Journal, Volume 58, Commencing at page 821 (August 1982) Article "Convention on Foreign Arbitration Awards"

Journal of Maritime Law and Commerce "Implementation of the United Nations Convention on Foreign Arbitral Awards in the United States" Vol. 2, No. 4, July 1971

New York Law School Journal of International & Comparitive Law, Vol. 5, No. 1, page 3 "The Express Defenses of the New York Convention on Foreign Arbitral Awards"

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However, the unique fact pattern underlying the instant legal proceedings have never before been the subject of judicial scrutiny in this country.

By its express terms and conditions, the Convention appears to substantially warrant the non-recognition and non-enforcement of the Abrahamson Award in favor of ACME. The Supplementary Agreement (A72) duly provided that both it and the original agreement (A82) were to be construed with the laws in Pakistan. Article V 1(a) of the Convention expressly states:

Southwestern University Law Review, Vol. 3 of 1971, page 1 "American Arbitration Accession Arrives in the Age of Aquarious; U.S. Implements United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards"

The Yale Law Journal, page 1049, Vol. 70, "Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards"

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> Recognition and Enforcement of the award may be refused at the request of the party against whom it is invoked only if that party furnishes to the competent authority where the recognition and enforcement has sought proof that (a)...the said agreement is not valid under the law to which the parties have subjected it. . .

This requisite was duly satisfied as evidenced by the issuance of the order of the Civil Court in Lahore, Pakistan on January 13, 1981 (A51). Senior Civil Judge Malik duly set forth that court's view (A63) as follows:

> In view of the above, the petition under §33 of the Arbitration Act is allowed as prayed for by the Petitioner (MCP) and it is declared that clause 9 of the agreement dated January 6, 1977 (the arbitration clause) is invalid, void, ineffective, inoperative and of no legal effect and it does not confer to any right on respondent No. 1 i.e., ACME to refer any dispute or difference arising between the parties for arbitration to ICC at Paris/Geneva. It is further held that Respondent No. 2, i.e., the

> arbitrator has no power to proceed with arbitration referenced to him under the invalid clause of the agreement. . .

The foregoing decision of this Court of competent jurisdiction, as was previously noted, was duly conveyed to both ACME and arbitrator Abrahamson prior to the holding of any evidentiary hearings and the issuance of the subsequent arbitration award which has now been confirmed into a judgment by the courts below. Neither ACME nor the arbitrator Abrahamson appeared in the Civil Court proceeding at Lahore, Pakistan despite having duly acknowledged that they were both timely served with legal process with respect thereto. Additionally, neither ACME nor arbitrator Abrahamson ever sought to appeal the instant decision of Judge Malik in any court in Pakistan.

On the contrary, arbitrator Abrahamson deemed himself competent to unilaterally ignore and overrule this judicial decision (A20) on the grounds set forth in the award itself. However, the courts below were duly and timely presented with Pakistani Professor Ashtar Ausaf Ali's Affidavit (A65) which inter alia noted at A68 through A69 as follows:

> That the order of the Civil Judge dated 13/1/81 (January 13, 1981) has become final in Pakistan and in accordance with the law applicable, therefore, the same could not be set aside, ignored or challenged by an arbitrator. The order of the Civil Judge, even if it were assumed that the same was not legal, can only be set aside by the High Courts in Pakistan.

Article V of the Convention further provides at Section 1(e) that:

> Recognition and enforcement of the award may be refused... if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that

> the award...has been set aside or suspended by a competent authority of the country...under the law of which that award was made.

Arbitrator Abrahamson's contumacious subsequent issuance of an award in the face of a specific conflicting judicial directive and that award's misguided insistence on the basis of ex parte proofs in the proceedings that the law of Pakistan was not to be applied despite the expressed written consent of ACME and MCP, also clearly brings this dispute within the ambit of Article V (1)(c) of the Convention. That provision calls for discretionary non-enforcement by the courts in this country when "the award...contains decision on matters beyond the scope of the submission to arbitration..." To this extent, the Convention somewhat mirrors the doctrine which has evolved

with respect to domestic arbitration awards whereby same may be vacated on the basis of "manifest disregard of the law". Wilko v. Swan, 346 U.S. 427, 98 L Ed 168, 74 S.Ct 182.

Substantial public policy considerations also exist which warrant a review of the underlying proceedings by this tribunal and potentially a reversal of the decisions below. The Convention itself explicitly provides for discretionary non-recognition and non-enforcement of foreign arbitral awards if same would be contrary to the public policy of the country of which enforcement is sought. (Article V(2)(b). Federal courts below, when faced with arguments on these grounds, although in clearly dissimilar factual circumstances, have noted that recognition and enforcement of foreign arbitral awards should not follow if it

would violate basic notions of morality and justice. In Parsons and Whittemore Overseas Co. v. Societe Generale de l'Industrie de Papier (RAKTA), 508 F.2d 969 (2d Cir. 1974), Circuit Judge J. Joseph Smith writing for the U.S. Court of Appeals Second Circuit duly noted that the legislative history with respect to this particular provision offers no certain guidelines to its construction, 508 F.2d 969 at page 73. He went on to note that the commentators were divided as to whether or not the Convention in fact extended the public policy exception in the predecessor Geneva Convention.2/

2/ Contini, International Commercial Arbitration, 8 Am. J. Comp. L. 283 (1959) c.f. Quigley, Accession by the U.S. to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards supra

An evident material consideration of the Second Circuit's decision in this matter to interpret the public policy defense on restrictive grounds was the court's recognition of the theory of reciprocity as constituting a material concept of the Convention. Specifically, the decision itself refers to Article XIV of the Convention which provides:

> A contracting state shall not be entitled to avail itself of the present Convention against other contracting states, except to the extent that it is itself bound to apply the Convention.

This lower court, having taken into consideration this principle, then went on to state (508 F.2d 969 at 974) as follows:

> ...counsel courts to invoke the public policy defense with caution lest foreign courts frequently accept it as a defense to enforcement of arbitral awards rendered in the United States.

As the record below has clearly established, the foreign sovereign state of Pakistan has never ratified the Convention. The District Court below has determined that in view of the fact that the arbitration award was rendered in Switzerland, which is a contracting state, the award is enforceable in the United States against Pakistan, insofar as the United States is also a contracting state to the Convention. Although this is in conformity with one other prior lower court decision, it does create an apparent equitable, if not legal, anomaly.

The court in Parsons and Whittemore Overseas Co. supra went on to determine that the public policy issues raised by the appellant were not in the nature of "national" policy considerations and as such were clearly distinguishable

from the intent of the Convention. The appellant in that case had argued that the United States' suspension of diplomatic relations and financial aid with Egypt justified it, the appellant, as a loyal American citizen, to abandon its contractual obligations. That is a clearly different issue from the one presented here.

The public policy consideration in this dispute reflects on maintaining the integrity of the judicial system in Pakistan, a friendly foreign sovereign state. If the decisions below are left intact, an unlawfully rendered arbitration award which now totals, with accrued interest, approximately $3,000,000.00, will be cloaked with the authenticity of a formal judgment of a U.S. court on the basis of an international treaty to which Pakistan was never a signatory.

Furthermore, the judgment debtor MCP, is a limited liability company whose sole shareholder is the Government of Pakistan. To this extent, ACME has been able to so far successfully utilize the judicial system of the United States as a collection agency for a debt that is questionable at best.

An additional public policy consideration which is to be borne in mind is that the courts in Pakistan have determined, under applicable Pakistani law, that the instant dispute was not properly subject to arbitration, but rather required litigation. That judicial philosophy in Pakistan is not something completely foreign to the present status of our own domestic law. Notwithstanding the fact that it is evident that courts have increasingly favored the integrity of arbitration

when the parties have so consented in the United States; Wilko v. Swan supra still remains valid law. In that litigation, a party had consented to settle all disputes by arbitration and subsequent to said consent then sought to litigate certain issues relating to the Securities Act of 1933. Notwithstanding the previously executed consent to arbitrate, this tribunal ultimately held in the Opinion of Justice Reed (98 L.Ed 176):

> The United States Arbitration Act contains no provision for judicial determination of legal issues such as is found in English law. As the protective provision of the Securities Act requires the exercise of judicial direction to fairly assure their effectiveness, it seems to us that Congress must have intended Section 14 Note 6 supra to apply to waiver of judicial trial and review.

The court then went on to conclude as follows:

> Congress has afforded participants in transactions subject to its legislative power an opportunity generally to secure prompt economical and adequate solution of controversies through arbitration if the parties are willing to accept less certainty of legality correct adjustment. On the other hand, it has enacted the Securities Act to protect the rights of investors and has forbidden a waiver of any of those rights. Recognizing the advantages that prior agreements for arbitration may provide for the solution of commercial controversies, we decide that the intention of Congress concerning the sale of securities is better carried out by holding invalid such an agreement for arbitration of issues arising under the Act. (98 L.Ed at p.177)

The subsequent decisions of this tribunal have only served to distinguish its holding in Wilko, supra, rather than overturn it. Particularly, even in Shearson/American Express Inc., supra, the majority Opinion of Justice O'Connor specifically provided at page 12:

> The conclusion in Wilko was expressly based on the Court's belief that a judicial forum was needed to protect the substantive rights created by the Securities Act: 'As the protective provisions of the Securities Act require the exercise of judicial direction to fairly assure their effectiveness, it seems to us that Congress must have intended section 14. . . to apply the waiver of judicial trial and review.' Id., at 437. Wilko must be understood, therefore, as holding that the plaintiff's waiver of the right to select the judicial forum, id., at 435, was unenforceable only because arbitration was judged inadequate to enforce the statutory rights created by section 12(2).(emphasis supplied)

In the same manner, as the courts of this nation continue to recognize that certain disputes are not capable of resolution by arbitration even in the event of express consent by the parties, the courts of Pakistan have made a somewhat less drastic, but similar interpretation as evidenced by the declaratory judgment of the Civil Court at Lahore's July 13, 1981

Opinion by Judge Malik. On public policy grounds, if this Court were to allow the rulings below to stand, it would have the ultimate effect of usurping the proper interpretation of Pakistani Law by Pakistani courts in favor of legitimatizing a contrary conclusion on those points of law issued by an arbitrator who lacked any apparent qualification with respect to the law of Pakistan.

Certainly, the inclusion of the public policy defense provision at Article VI(2)(b) of the Convention must have been designed to encompass and prevent such a radically incongruous result.

CONCLUSION

Mechanised Construction of Pakistan Ltd.'s Petition for a Writ of Certiorari should be granted.

Dated: New York, New York
December 10, 1987

Respectfully submitted,

DUNN & ZUCKERMAN, P.C.
Attorney for Petitioner
17 Battery Place
New York, N.Y. 10004

Of Counsel,

Peter M. Bellsey

APPENDIX

BEST AV

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 38 - August Term 1987

(Argued September 2, 1987
Decided September 14, 1987)

Docket No. 87-7340

American Construction Machinery & Equipment Corporation Ltd.,

Petitioner-Appellee,

-against-

Mechanised Construction of Pakistan Ltd.,

Respondent-Appellant.

Before FEINBERG, Chief Judge, PIERCE and ALTIMARI, Circuit Judges.

Appeal from order of United States District Court for the Southern District of New York, John F. Keenan, J., confirming award pursuant to Convention of Recognition

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and Enforcement of Foreign Arbitral Awards, reprinted in 9 U.S.C.A. Section 201 note (West Supp. 1987).

Affirmed.

PETER M. BELLSEY, New York, NY (Dunn & Zuckerman, P.C.). of Counsel, for Respondent-Appellant.

GERALD AKSEN, New York, NY (Reid & Priest, Christopher Connolly, of Counsel), for Petitioner-Appellee.

Per Curiam.

The judgment of the United States District Court for the Southern District of New York, confirming an award pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, reprinted in 9 U.S.C.A. Section 201 note (West Supp. 1987), is affirmed substantially for the reasons given by Judge Keenan in his opinion published at F. Supp. (S.D.N.Y. 1987).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AMERICAN CONSTRUCTION MACHINERY & EQUIPMENT CORPORATION LTD.,	:	
Petitioner,	:	85 Civ. 3765 (JFK)
-against-	:	
MECHANISED CONTRUCTION OF PAKISTAN LTD.,	:	OPINION and ORDER
Respondent.	:	

APPEARANCES:

For Petitioner:
Gerald Aksen, Esq.
Reid & Priest
New York, New York
Of Counsel: Christopher Connolly

For Respondent:
Peter M. Bellsey, Esq.
Dunn & Zuckerman, P.C.
New York, New York

JOHN F. KEENAN, United States District Judge

JOHN F. KEENAN, United States District Judge:

BACKGROUND

Petitioner, American Construction Machinery & Equipment Corporation, Ltd. ("ACME",), brings this instant motion to confirm a foreign arbitration award it obtained against the respondent, Mechanised Construction of Pakistan Ltd. ("MCP"). ACME is a Cayman Islands corporation with a Westchester County office. During the relevant activities, the office was located in Tarrytown. MCP is a wholly-owned enterprise of the Pakistan government.

On January 6, 1977, the parties entered a contract that called for ACME to supply MCP with goods and services to be used in MCP'S Iraq construction project. The contract included an arbitration clause which stated,

> [a]ny dispute or difference arising between the parties concerning the interpretation of any provision of this agreement or performance or any action taken there-under shall be settled in the first instance directly between the parties and if no such settlement is possible by referring to the International Chamber of Commerce [ICC] at Paris/Geneva for arbitration.

Petition, Exh. A, Section 9. The parties entered a Supplementary Agreement dated May 22, 1978, which stated the governing law would be that of Pakistan.

Almost one year later, on May 1, 1979, ACME filed a claim with the ICC. One June 24, 1979, MCP participated in the arbitration proceedings by filing a reply and a counterclaim for $ 1 million. See Connolly Affidavit, Exh. 1, 2. The ICC Court of Arbitration selected Geneva as the site for the arbitration and Max W. Abrahamson,

Q.C., was chosen as the sole arbitrator. Petition, Exh. C. Sections 3,13. After designating authorized representatives, on March 19, 1980 the parties signed the Terms of Reference for the arbitration. Petition, Exh. C Section 2. One of the issues the parties agreed to have arbitrated was what effect if any the Supplementary Agreement would have on the original January 6, 1977 Agreement. Id., Exh. C, Section 2(d)(i). A hearing was scheduled for June 1 and 2, 1981. Despite receiving proper notice of the hearing, MCP elected not to attend. Id., Exh.C, Sections 14, 15.

By signing the Terms of Reference, MCP had accepted the Arbitrator's jurisdiction, Geneva as the location of the arbitration, and the use of Geneva's procedural rules.

MCP, however, decided to pursue another strategy. In July, 1980, MCP stated that it viewed the arbitration as invalid under the law of Pakistan. It proceeded to petition a court in Lahore, Pakistan for a declaration invalidating both the arbitration and the arbitration clause. In that action, ACME and Arbitrator Abrahamson were named as defendants. Id., Exh. C, Section 6. MCP's petition, which according to the Arbitrator contained "omissions and positive misstatements," id., Exh. C, Section 8, was granted on January 13, 1981. Id., Exh. C Section 6.

The Arbitrator reached his decision in this case on May 24, 1982. Id., Exh. C. He found in favor of ACME on its claim, and against MCP on its counterclaim. In addition, he determined that even if Pakistani

law were applicable, MCP's objections were meritless. Id., Exh. C, Sections 8-12. New York law was found to govern the January 6, 1977 Agreement, id., Exh. C, Sections 28, and the Supplementary Agreement was held invalid. Id., Exh. C, Sections 20-22. ACME timely filed a petition is this Court on May 17, 1985 to confirm the arbitral award pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("Convention"), which is given the force of United States law at 9 U.S.C. Section 201.

In this Court, MCP has previously moved to dismiss the petition to confirm the award on grounds of lack of personal and subject matter jurisdiction and improper venue. The Court rejected these positions, and briefs were filed on the motion to

confirm the arbitration award. For the reasons set forth below, the Court confirms the award which directed MCP to pay ACME, (a) $1,402,924.00 including interest up to December 21, 1981; (b) interest at the rate of 17% on that sum from December 22, 1981 until the date of payment; (c) arbitration costs of $45,057.57; and (d) ACME's legal costs calculated at $87,500.00. Id., Exh. C, Section 31.

DISCUSSION

On a motion to confirm an arbitral award entered pursuant to the Convention, a federal court "shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention." 9 U.C. Section 207. Respondent raises several of the defenses

set forth in Article V of the Convention. First, it is asserted that the arbitration agreement "is not valid under the law to which the parties have subject it." See 9 U.S.C. Section 201, note, Article V, 1(a). Second, respondent argues that the award contains decisions on matters beyond the scope of the arbitration agreement. See id., Article V, 1(c). Third, respondent states that "the arbitral authority of the arbitral procedure was not in accordance with the agreement of the parties...." Answer, Section 18. Finally, respondent claims that the award has been set aside "by a competent authority of the country in which, or under the law of which, that award was made." See Article V, 1 (e). Two defenses not found within Article V(1) are also presented: the arbitration

agreement should be vacated as contrary to United States public policy and the award was in "manifest disregard" of the applicable law. The Court rejects each of these defenses.

As a preliminary matter, the Court notes that there is a "general pro-enforcement bias" manifested in the Convention. See Parsons & Whittemore Overseas Co. v. Societe Generale de l'Industrie du Papier (RAKTA), 508 F.2d 969, 973 (2d Cir. 1974). The party opposing confirmation of the award bears the burden of proof. La Societe Nationale v. Shaheen Natural Resources Co., Inc., 585 F. Supp. 57, 61 (S.D.N.Y. 1983), aff'd, 733 F.2d 260 (2d Cir.), cert. denied, 469 U.S. 883 (1984). MCP has failed to meet this burden.

MCP first argues that the award should not be confirmed because it is invalid under the laws of Pakistan. This argument is unavailing because it assumes that the laws of Pakistan were designated by the parties to apply to their agreement. While it is true that the Supplementary Agreement contained a choice if law clause selecting Pakistani law, the Arbitrator ruled that the Supplementary Agreement was invalid under both Pakistani and New York law. See Petition, Exh. C, Sections 21-26. Thus, to accept MCP's Article V(1)(a) defense would require this Court to reverse one of the Arbitrator's express findings of law. The scope of the Court's review in this regard is extremely limited. See Parson's, 508 F.2d at 977. An examination of the Arbitrator's findings shows he carefully

considered the applicable Pakistani law in ruling that the Supplementary Agreement was invalid. See Petition, Exh. C, Sections 23, 24. Because his result is certainly a "colorable justification for the outcome reached," see Andros Compania Maritima, S.A. v. Marc Rich & Co., 579 F.2d 691, 704 (2d Cir. 1978), MCP's Article V(1)(a) defense is rejected.

MCP's defense under Article V(1)(c) is also rejected. The defense asserts that the Arbitrator decided matters beyond his authority. Article V(1)(c) is construed narrowly to advance the "enforcement-facilitating thrust of the Convention." Parson's, 508 F.2d at 976. In this case there is no doubt that MCP consented to arbitration of the matters ultimately decided by the Arbitrator. See Petition

Exh. A, Section 9. As was previously noted, MCP signed the Terms of Reference which set forth the issues to be arbitrated.

In its answer, MCP raises a defense under Article V(1)(d). See Answer Section 18. That provision of the Convention provides a defense if, "[t]he composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the county where the arbitration took place." This in inapplicable in the instant case. MCP agreed to have the ICC Court of Arbitration select the arbitrator, see Connolly Affidavit, Exh. 1, and in the Terms of Reference accepted the arbitrator's jurisdiction and Geneva as the

place of arbitration, along with its procedural rules. See id., Exh. 5 Section (f)-(h).

Article V(1)(e) permits non-recognition of an arbitral award when it "has not yet become binding on the parties, or has been set aside or suspended by competent authority of the country in which, or under the law of which, that award was made." This provision does not assist the Respondent. The law under which this award was made was Swiss law because the award was rendered in Geneva, pursuant to Geneva procedural law. The Terms of Reference clearly spelled out that this law would apply. MCP asserts that the award was rendered under Pakistani law based on the Supplementary Agreement's choice of law provision. However, as mentioned earlier,

this Court will not employ its view of the Supplemental Agreement's validity, or invalidity, and displace the view of the Arbitrator.

Respondent's contention based upon Article V(2)(b), that recognition of the award would be contrary to United States public policy in not persuasive. This defense is very narrow and is only applicable when enforcement "would violate the forum state's most basic notions of morality and justice." See Parsons, 508 F.2d at 976. This is hardly such a case. Respondent urges that this Court conclude United States public policy would be offended by confirming an arbitral award in the face of a Pakistani judgment that the arbitration clause and proceeding were void. In fact, public policy would be

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violated if the Court declined to confirm the award. The Pakistani proceeding was, according to the Arbitrator, marked by MCP's "omissions and positive misstatements." Respondent had agreed to arbitrate, appeared in the proceeding, and then sought to circumvent the process. In light of this strategy, enforcing the award in no way violates this forum's notions of justice.

Finally, respondent's reliance on Wilko v. Swan, 346 US. 427 (1953) as grounds to vacate the award is misplaced. In Wilko, the Supreme Court held that Securities Act of 1933 claims were not arbitrable in domestic arbitration cases. However, in Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974), the Supreme Court held federal securities laws claims arising under "a

truly international agreement" are arbitrable pursuant to a broad arbitration clause. The Supreme Court followed this approach in the antitrust context in Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985). Thus, Wilko in no way stands as an obstacle to the confirmation of the instant award.

Petitioner also moves for the imposition of Rule 11 sanctions. While this Court does not find any of MCP's arguments persuasive, neither does it find these arguments to be so frivolous as to warrant invocation of Rule 11.

CONCLUSION

Petitioner's motion to confirm the arbitral award is granted and its request

for Rule 11 sanctions against respondent is denied. Judgment shall be so entered.

SO ORDERED.

Dated: New York, New York
March 23, 1987

/S/
JOHN F. KEENAN
U.S.D.J.

AMERICAN CONSTRUCTION MACHINERY & EQUIPMENT CORPORATION LIMITED

Claimant

V.

MECHANISED CONSTRUCTION OF PAKISTAN LIMITED

Respondent

INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION YD/MR No. 3614

AWARD

DISPUTES AND APPOINTMENT:

1. The Claimant (a corporation incorporated in the Cayman Islands, but with its principal place of business in New York) was employed by the Respondent (a Pakistan state-owned enterprise) "as a purchasing and supply agent for procurement of machinery equipment and related items and services" required by the Respondent for performing a construction contract in Iraq, originally by an agreement made on 6th

January 1977. Disputes arose between the parties connected with payment for the services.

2. The Terms of Reference in this arbitration, dated 19th March 1980 and signed on behalf of the parties, define the disputes as follows:

> "(c)(i) The Claimant claims that it performed all its obligations under the Agreement of 6th January 1977 save insofar as full and effective performance was prevented by the Respondent. It claims that the Respondent in breach of contract interfered with the Claimant's performance of the Agreement by refusing to make credit arrangements, refusing to accredit the Claimant's status and personnel, and refusing to make any of the payments to the

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Claimant provided for in the Agreement. The Claimant claims damages and compensation measured at 5% of the F.O.B. invoice value of all machinery, equipment and related items supplied for the Lower Khalis Project in Iraq, under clause 5 of the Agreement.

The Claimant also asserts that a Supplementary Agreement between the parties dated 22nd May 1978 lacked consideration and was obtained from it under economic duress and on faith of an oral promise by the Respondent to make immediate payment of money due which was never made. It claims therefore that under Clause 13 of the January 1977 Agreement, the May 1978 Agreement cannot modify the payment

terms of Clause 5 of the January 1977 Agreement.

(ii) The Respondent's defense is that the Claimant defaulted in performance of its obligations in providing stipulated services under the January 1977 Agreement, thereby forcing the Respondent to undertake most of the responsibilities whereafter a Supplementary Agreement dated May 22, 1978 was entered into by the parties, validly specifying the terms of payment and the maximum amount claimable by the Respondent, subject, of course, to the provisions of the agreements; that as a result of the Claimant's non-performance of services, the Claimant is not entitled to claim compensation at the rate of 5% of F.O.B. invoice value of

the goods supplied; that the Respondent, due to defaults of the Claimant, has incurred expense and loss, deductible from the Claimant's bill of compensation or chargeable from Claimant and thus Respondent's counterclaim for loss and expense estimated at one million dollars, due to delay to the Lower Khalis Project.

d The issues to be determined in this arbitration are:

(i) What compensation (if any) is due or will become due by the Respondent to the Claimant under the Agreement of 6th January 1977 as validly affected (if at all) by the Agreement of 22nd May 1978, and on what terms of payment?

(ii) Is the Respondent entitled to any (and if so to what) compensation from

the Claimant on the grounds claimed by the Respondent, that is for breach of either or both of the Agreements resulting in loss or expense to the Respondent due to delay to or other effects on the Lower Khalis Project?

(iii) Is the Respondent entitled to deduct any compensation awarded under par. (ii) wholly or partly from any compensation awarded under para. (i)?"

3. I was appointed sole arbitrator of the disputes by the Court of Arbitration of the International Chamber of Commerce at its session on September 19th 1979, under the arbitration clause in the January agreement.

JURISDICTION

4. On the 29th July 1980, after I had notified a date for the full hearing of the

dispute, the Respondent contended for the first time that the arbitration proceedings were invalid under Statute law of Pakistan. The Respondent also repeated other objections to my jurisdiction, on which I had already ruled in favour of the claimant after submissions by the parties' Attornies (sic) before the Terms of Reference were signed.

5. Having given the Attornies (sic) of the parties an opportunity to make submissions on this new objection, which they did, on 1st September 1980 I telexed to them my reasoned decision under Article 8 of the ICC Rules that the proceedings were valid and I had jurisdiction.

6. Subsequently the Respondent petitioned the Senior Civil Judge Lahore,

naming the Claimant and myself as defendants, for declarations invalidating the arbitration clause and the arbitration proceedings. Neither defendant appearing in the proceedings, the petition was granted on 13th January 1981 (of which I was not informed on behalf of the Respondent until 2nd March 1981).

7. The Senior Civil Judge constitutes a court of limited jurisdiction (the petition stated "...the value for the purposes of jurisdiction is fixed at Rs. 20,000 ...") below the High Court.

8. The documents supporting the petition are extremely misleading because of omissions and positive misstatements. For example, it is not disclosed that the Respondent confirmed acceptance of the arbitration clause and appointment of a

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sole arbitrator in its Answer to the Request for Arbitration and in a subsequent letter to me of 11th February 1980, or that the Terms of Reference signed on 19th March 1980 by the Attorney for the Respondent (whose authority to do so had previously been confirmed in writing by the Respondent at my request) stated "... the jurisdiction of the Arbitrator to determine finally the issues referred to in these Terms of Reference was accepted on behalf of the parties". It is claimed in the petition that the January agreement was signed at Lahore, Pakistan (as stated on the agreement as typed), whereas at the hearing I was given conclusive oral and documentary evidence that it was in fact signed in Baghdad, Iraq, as is recited in the opening

of the later Supplementary Agreement signed by the Respondent.

9. More important, (to quote from the judgment on the petition): "In support of his contention, the Learned Counsel for the petitioner has relied on A.I.R. 1964, S.C.558... (and) has presented PLD 1961 S.C.573 wherein the Honourable Supreme Court held that there was no notification by Pakistan Government under Section 7 of the said "Arbitration (Protocol and Convention) Act, 1937.

10. The Petition did not disclose and the judgment did not advert to the fact that following that decision the Foreign Awards and Maintenance Orders Enforcement (Amendment) Ordinance 1962 added a section retrospectively to the 1937 Act, as follows:

> "For the removal of doubt it is hereby declared that any notification issued under this section by the late Government of India before the 16th day of August 1947 and in force on that day for the purpose of enforcement of foreign awards in British India declaring any Power to be a party to the said Convention or any territory to be the territory to which the Convention applies shall be deemed to be a notification issued by the Central Government for the purpose of enforcement of foreign awards in Pakistan".

11. Nor is there any reference in the petition or judgment to the later decision in G.M. Pfaff A.G. v. Sartaj Engineering Co. Ltd. Lahore, PLD 1970 Lahore 184, in which the Lahore High Court held that:

> "One of the agencies existing in realm of international commerce for settling disputes arising out of international transactions by arbitration is the International Chamber of Commerce. Its headquarters are in Paris. If two parties residing in two different High Constracing Countries enter into an agreement to refer to their disputes to arbitration and in this

> connection agree to abide by rules of the International Chamber of Commerce the award would then be a foreign as defined by section 2 of Act VI of 1937 and would be enforceable in this country under that Act. This is highly consistent with the provisions of Section 47 of the Arbitration Act of 1940. The objections on the score that Article 182 of the Articles of Association of the Kayser-Sartaj Company (the ICC arbitration clause) is violative of section 152 of the Companies Act, or section 46 or 47 of the Arbitration Act, 1940, are therefore devoid of all force and cannot be sustained, and the agreement to refer disputes to arbitration in the present case is in accordance with law and is enforceable under the law, referred to above."

As clarified by the Amendment Ordinance 1962 referred to above and confirmed by this decision, Pakistan is a High Contracting Country. The United Kingdom signed the Geneva Convention of 1927 on behalf of its colony the Cayman Islands, so that the Claimant's country of registration

is also a High Contracting Country. The United States of America is a High Contracting Country.

12. Therefore, even if the Respondent was correct in contending that the issue of my jurisdiction was governed by the law of Pakistan, the reasons on which its objection to my jurisdiction was based have no foundation in that law. It is unnecessary to deal with several other grounds that establish my jurisdiction. I confirm my decision that this arbitration is valid and that I have jurisdiction to give a binding award.

HEARING & EVIDENCE:

13. The Court of Arbitration of the International Chamber of Commerce had fixed Geneva as the place of arbitration under Article 12 of the Rules, and the Terms of

Reference specifically confirmed that "The place of arbitration shall be "Geneva".

14. On the 7th May 1981 I telexed the Attornies (sic) for both parties and sent a copy of my telex direct to the Respondent by registered post, fixing the start of the hearing for 1st June 1981 in Geneva, at a venue and time stated. I received a reply for the Attorney for the respondent on 22nd May, telling me that he would not attend the hearing. On 28th May I replied by telex that nevertheless the hearing would proceed as planned.

15. The hearing took place in Geneva on the 1st and 2nd June 1981. The Claimant was represented by its Attorney but the Respondent did not appear. I read affidavits and heard the oral evidence of Mr. Will Raymond, the Director of the Claimant

most concerned with negotiations and performance of the January agreements on behalf of the Claimant, and I read files and documents referred to in his evidence. I was also referred to legal authorities by the Claimant's Attorney.

16. The Claimant's documents established in detail the F.O.B. invoice value of the machinery, equipment and related items for the first lower Khalis project, in respect of which the claimants became entitled to 5% commission under clause 5 of the agreement of 6th January 1977. The documents were verified by the oral evidence of Mr. Raymond. Mr. Raymond also gave evidence, supported by documents, of the work performed by the Claimant for the Respondent as purchasing and supply agent; evidence that the Respondent failed

to open a letter of credit in favour of the Claimant for its fees, in breach of the January agreement; that the Respondent failed to accredit in Iraq the Claimant and its personnel; evidence of delays in procuring plant caused by the Respondent's changes of plans, and of frequent daily attendance by Mr. Raymond of the Respondent's personnel in order to ensure smooth delivery and shipment of plant; evidence that the Respondents representatives refused to meet him to discuss payment; that no payment was received from the Respondent despite the heavy expenses that had been incurred by the Claimant in performing its duties under the January agreement; that eventually the Respondent demanded that the Claimant sign a supplementary agreement, on the basis that if it

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accepted the agreement it would be paid immediately and if it did not it would get nothing; that because of the circumstances in which the Claimant has been placed as a result of the Respondent's failure to pay, the jobs of the staff that were at risk and the possible collapse of the Claimant, he executed the Supplementary Agreement dated May 22nd, 1978.

17. The Respondent had failed to supply before the hearing documents relating to its defense and counterclaim, in breach of the Terms of Reference, as well as failing to attend the hearing. The statements of its defense and counterclaim that the Respondent did deliver are in very general terms. In its Reply dated 24th June 1979 to the Request for Arbitration the Respondent says - "It is correct that

under the original Agreement dated January 7, 1977 and subject to the provisions of the Supplementary Agreement dated May 22, 1978, the Claimant was entitled to be compensated as stipulated thereunder, provided Claimant performed the requisite services. However, Claimant failed to perform satisfactorily under the contract." Apart from the reference to commissions which is dealt with separately in this Award, the Respondent has not given any details of the alleged failure of performance by the Claimant, nor has it referred to any contemporaneous documents recording or protesting about such failure.

FINDING

18. I find that the Claimant fully performed its duties under the January

agreement, except in so far as it was prevented from doing so by the Respondent.

19. By clause 5 of January agreement "In consideration of services rendered by ACME under this contract, MCP shall compensate ACME in the amount of 5% (five percent) of the first of the two L.K. Projects and at 4% (four percent) on the second L.K. Project at the F.O.B. (Free on Board) invoice value of all goods supplied. Such payments shall be effected by invoicing said remuneration as one of the items of the relative invoice and drawing for the amount due under provisions of the cover letter of credit". As I have mentioned, the Respondent broke this agreement by not opening any letter of credit.

20. I find that the supplementary agreement did not validly affect the

Claimant's right to payment under the January agreement.

21. The Claimant claims that the law of New York governs the validity of the Supplementary Agreement, because it executed the agreement there and it is there that the majority of its services under the agreement were to be performed and payments made by letters of credit. The Respondent claims that the law of Pakistan governs particularly because the agreement says so. It is unnecessary for me to decide that issue because I hold that under both of these legal systems the agreement is invalid on one or more of the grounds pleaded by the Claimant.

22. I find that the Supplementary Agreement was not a bona fide settlement of disputes, as alleged by the Respondent, but

on agreement entirely for the benefit of the Respondent which it obtained by refusimg to perform its existing duties under the Janauary agreement unless a supplementary agreement was signed altering those duties to its benefit. The Claimant executed the Supplementary Agreement under coercion of will, faced with financial ruin unless payment was received for the services it had rendered. The written record establishes that for a year the Respondent flouted the January agreement and took advantage of the Claimant's lack of effective redress so as to place irresistible pressure on the Claimant. Having obtained the Supplementary Agreement the Respondent did not pay as promised even in it, or indeed make any payment whatever to the Claimant.

23. Under the Contract Act of 1872 which contains a code of the contract law that applies in Pakistan:

> "Section 10. All agreements are contracts if they are made by free consent of parties..."
>
> Section 14. Consent is said to be free when it is not caused by... coercion, as defined in section 15...
>
> Section 15. "Coercion" is the... threatening to detain any property, to the prejudices of any person whatever, with the intention of causing any person to enter into an agreement.

Section 25. "An agreement made without consideration, is void unless... (exceptions which do not apply in this case".

24. I refer also to two decisions which are of persuasive authority in Pakistan - the Privy Council decision in Pao On v Lau Yiu (1979) 3 All England Reports: 65, at 79, where Lord Scarman in his judgment observed that "there is nothing contrary to principle in recognising economic duress as a factor which may render a contract voidable... (for) coercion of will", and the High Court in North Ocean Shipping Co. Ltd. v Hyundai Construction Co. Ltd. (1978) 3 All England Reports 1170. In the latter case the defendants agreed to build a tanker for the

plaintiffs, at an agreed price expressed in U.S. dollars, payable in five installments. After the plaintiffs had paid the first installment the international value of the dollar dropped sharply and the defendants demanded an increase of 10% in the price and threatened not to complete the ship if it was not forthcoming. Unknown to the defendants, this threat was particulary powerful as the plaintiffs had made a profitable contract to charter the ship on completion. The plaintiffs therefore agreed to pay the extra money demanded and did so. Some eight months later they claimed repayment of the excess over the originally agreed price. It was held in the High Court that in principle this was a case of economic duress, since the threat

not to build the ship was both wrongful and highly coercive of the plaintiff's will.

25. "A promise to do what one is already under an obligation to perform, whether under the law or by virtue of an existing contract is not binding" (Dutt, on the Contract Act 1872, 4th ed. 1969, under the heading "Unreal Consideration" and quoting authorities).

26. American law now recognises that a contract may be avoided on the ground of economic duress. Refer, for example, to Williston on Contracts, 3rd Edn. (1970) Ch. 47.

27. I find that all commissions or discounts received by the Claimant from suppliers to the Respondent were credited to the Respondent when received, so that there was no fraud by the Claimant. The

commissions and discounts are credited in the Claimant's calculations of the claim.

28. Under both the law of New York, which I find is the proper law of the January agreement, and the law of Geneva as the lex fori, I am entitled to award interest sums found due from the date of which payment became due to the date of actual payment, at the prevailing commercial rates of interest. As to the law of New York I refer specifically to Article 75 and Section 7507 of the Civil Practice Law and Rules, and the decisions in C.F. Simonin's Sons Inc. v Centanio Corrao Corp. 285 Appelate Division Reports, p.953 (Supreme Court, Appellate Division, 2nd Department, March 7th 1955) and Kennedy v Dominick International Corp. 55 Appellate Division Reports 2nd, P.555 (Supreme Court,

Appelate Division 1st Department, December 21st 1976). As to Swiss law, I refer to Articles 102, 104, and 106 of the Swiss Code of Obligations, and to Becker, Berner Kommentar; obligationenrecht, Note 2 to Article 73, Note 2 to Article 102 and Note 7 to Article 104, and Guhl: Das Schweizerische Obligationenrecht, 7th edition (1980) pp. 69 and 214-217.

29. A realistic average commercial rate of interest for the period from 1978 to 1981 and at the date of this Award is 17% p.a.

30. The proper currency of this award is U.S. dollars, because that is the currency which best represents the loss suffered by the Claimant due to nonpayment. The price of machinery bought in other currencies should be converted into dollars

at the rate of exchange when payment was due, for calculating the 5% remuneration payable to the Claimant under the January agreement, and I have done so.

AWARD

31. Having reviewed fully the evidence and the Claimant's calculations and vouchers I award that the Respondent shall pay to the Claimant:

(a) U.S. $1,402,924 (One million four hundred and two thousand, nine hundred and twenty four US dollars) as remuneration due to the Claimants under the January agreement for services rendered, after credits due and including interest up to 21st December 1981.

(b) Interest on that sum from 22nd December 1981 at the rate of 17 percent per annum until payment.

(c) The costs of this arbitration consisting of my fees and expenses and the administrative costs fixed by the Court of Arbitration amounting in all to U.S. $45,057.57 (Forty-Five thousand and fifty seven US dollars and fifty-seven cents), and in addition $87,500 (Eighty-seven thousand and five hundred US dollars) for the Claimant's legal costs of the arbitration (which in my opinion is a reasonable sum to cover the effective work done in this arbitration by the Claimant's Attorney and witnesses expenses).

32. I award that the Claimant is entitled to retain all discounts and commissions received as disclosed in this arbitration, in addition to the sum awarded under par. (a) above.

33. I dismiss the Respondent's counter-claim.

Dated 24th May, 1982.

/S/

MAX W. ABRAHAMSON

IN THE COURT OF MR. MUMIAZ HUSSAIN MALIK, CIVIL JUDGE, LAHORE.

inre: - Case No. 557/1 of 1980

Mechanised Construction of Pakistan Ltd.,
39, Main Gulberg, Lahore.

... Petitioner.

Versus

1. M/S American Construction Machinery & Equipment Corporation Ltd.,
   P. O. Box - 1561,
   Grand Cayman,
   Cayman Islands,
   B.W. - 1 Through its Chairman; Mr. Will Raymond.
2. Mr. Max W. Abrahamson,
   Solicitor,
   28/32 Upper Pembroke Street,
   Ireland.

. . . Respondents.

A 51

P E T I T I O N UNDER SECTION 33 OF THE ARBITRATION ACT, 1940

ORDER

The Petition under adjudication has been moved by the Petitioners, i.e. Mechanised Construction of Pakistan Limited under Section 33 of the Arbitration Act, 1940. Brief facts as stated by the Petitioner, leading to the institution of this Application are that the Petitioner is a Private Company, limited by shares, incorporated under Companies Act, 1913 vide Certificate of Incorporation dated 31-8-74, with its Head Office at 39, Main Gulberg, Lahore, Pakistan. All the shares of the Petitioner Company are owned and controlled by the Federal Government. The Petitioner, on securing a contract from the Iraqi Government for works at Lower Khalis Iraq, (known as K2 Project) entered into a contract dated 6-1-77, at Lahore, with

Respondent No. 1, which is a Cayman Islands Corporation. By this Contract Respondent No. 1 (referred to as ACME) was appointed as Purchasing and Supply Agent for procurement of machinery, equipment and services required by the Petitioner (Referred to as MCP) for the execution and performance of the above-said K2 Project. In consideration of services by Respondent No. 1, Petitioner undertook to pay ACME compensation at the rate of 5% of the FOB Invoice Value of the goods supplied on the first LK Project. Clause 9 of the Agreement dated 6-1-77 provided for reference of disputes to International Chamber of Commerce, Paris/Geneva for Arbitration, in case of any dispute or difference between the parties.

2. It has been further stated by the Petitioner in its application that in working of the Agreement dated 6-1-77, differences arose between the parties. A second Agreement called Supplementary Agreement was executed by the parties on 22-5-78, wherein all differences and disputes between the parties were settled. This Agreement is also claimed to have been signed at Lahore, Pakistan. Clause 10 of the Supplementary Agreement provided that notwithstanding anything contained in the original Agreement, the Supplementary Agreement shall override and prevail over the provisions of the original Agreement and Clause 12 provided that both the original and Supplementary Agreements were to be governed and interpreted in accordance with the laws in Pakistan.

3. The Petitioner further contends that relying on the Arbitration Clause No. 9, of the Agreement dated 6-1-77, the Respondent No. 1, on 1-5-79 sent to the Secretary General, International Chamber of Commerce, Court of Arbitration, a request for arbitration between the parties to settle the dispute regarding the amount of compensation payable by the petitioner to the Respondent No. 1, under the said Contract. The petitioner in reply, objected to the maintainability of reference to arbitration and requested the ICC, Court of Arbitration to reject ACME's reference as incompetent, The petitioner further contends that despite petitioner's objection, the ICC, Court of Arbitration nominated respondent No. 2 as Sole Arbitrator, empowering him, under the ICC,

Court of Arbitration Rules, to draw up Terms of Reference, to take evidence and to give an award determining the dispute between the parties under ICC Court of Arbitration Rules. The Petitioner raised the objection as to the validity and existence of the Arbitration Clause of the Agreement into the maintainability of the Arbitration under said Rules before the Respondent No. 2. Respondent No. 2, still proceeded to draw up the Terms of Reference and fixed the procedure and Schedule for hearings. In answer, the petitioner by a letter dated 27-7-80 as well as telex of the same date requested the Arbitrator i.e. Respondent No. 2 to stay the arbitration proceedings forthwith as the proceedings were null and void and he had no jurisdiction to proceed. The Respondent No. 2

rejected Petitioner's request and required the petitioner to adhere to his schedule of hearings fixed in Terms of Reference. The Petitioner, thus, by moving this application under Section 33 of the Arbitration Act 1940, challenged the existence and validity of Clause 9 of the Agreement dated 6-1-77, providing for the Reference of disputes between the parties for arbitration to ICC, Court of Arbitration.

4. The Respondents, despite service, did not appear before the Court, hence ex-parte proceedings were ordered against them.

5. The Petitioner in support of the above petition submitted Affidavit of Brig: (Retd) Aftab Ahmad Khan, Managing Director of the Company and on 6-1-81, presented Mian Ijaz Ahmad, Director Planning and Overseas Operations and General Attorney

and Authority holder of the Petitioner Company as the only witness. The witness, in his statement supported the above facts and presented Certificate of Incorporation dated 31-8-74 as EX.P/A, Agreement dated 6-1-77 as EX.P/B, Supplementary Agreement dated 22-5-78 as EX.P/C, the Terms of Reference as EX.P/D, Letter dated 27-7-80 as EX.P/E.

6. I have thoroughly examined the petition, the Supporting Affidavit, the Statement of the Witness, the documents EX.P/A to EX.P/E and the Rules of the ICC, Court of Arbitration. I have also heard the Counsel for the Petitioner at length.

The Counsel for the petitioner has submitted that in view of Section 152 of the Companies Act, a Company can refer disputes to Arbitration only in accordance

with the Arbitration Act, 1940. Any agreement for reference to Arbitration which is not in accordance with Arbitration Act, 1940, is, therefore, ultra vires the powers of the company and that section 47 of the Arbitration Act 1940 "shall apply to Arbitrations and to all Proceedings thereunder". The learned Counsel has also drawn my attention to Section 21 of the SPECIFIC RELIEF ACT which provides that:

> "and save as provided by the Arbitration Act 1940 no contract to refer present or future difference to Arbitration should be specifically enforced".

According to the Learned Counsel an agreement providing for an Arbitration to be conducted contrary to the manner envisaged under the Arbitration Act 1940, is, therefore, void and unenforcible. In this connection reliance is also placed on

Section 28 of the CONTRACT ACT. It is submitted that Section 28 of the Contract Act allows ouster of the jurisdiction of the Court by Agreement only where the Agreement is for Arbitration to be conducted under Arbitration Act, 1940.

Besides, it has been contended that the scheme of Arbitration under the Rules of ICC, Court of Arbitration, is entirely different and opposed to the scheme provided in Arbitration Act 1940. Therefore, the reference to ICC was invalid as it was not under the Arbitration Act 1940. Another argument advanced by the Learned Counsel to support this contention is that under Clause 12 of the Supplementary Agreement, the original as well as the Supplementary Agreement were to be governed and interpreted in accordance with the laws

in Pakistan. It has been submitted that according to the law of Arbitration in Pakistan, proceedings under 20 of the Arbitration Act 1940 were necessary and the Reference became void for failure to comply with Section 20 of the Arbitration Act 1940. Another point raised by the petitioner's Counsel is that in view of the Supplementary Agreement dated 22-5-78 being a negotiated settlement between the parties, no scope for reference to arbitration was left. It has been urged that under Section 31 of the Arbitration Act, 1940, the jurisdiction to determine the validity or effect of an Arbitration Agreement being vested in the Court, the Respondent No. 2 had no power to determine his jurisdiction. It has been further contended that the Arbitration (Protocol

and Convention) Act 1937 is inapplicable in view of absence of notification by Government of Pakistan and other respective Governments and because of the applicability of laws of Pakistan to the impugned agreement.

In support of his contention, the Learned Counsel for the petitioner has relied on A.I.R. 1964, S.C. 558, wherein it has been held that the scheme of Arbitration under I.C.C. Rules is different and opposed to the scheme of Arbitration Act 1940 and a Company incorporated under Companies Act is not obliged, under an Agreement, to submit to Arbitration, to be conducted under a scheme different from that of the Arbitration Act 1940 and the covenant so binding the company is invalid. In support of his contention regarding the

inapplicability of the ARBITRATION (PROTOCOL AND CONVENTION) ACT, 1937, the Learned Counsel has presented PLD 1961, S.C. 573, wherein the Hon'ble Supreme Court held that there was no notification by Pakistan Government under Section 7 of the said Act.

7. In view of the above, the Petition under Section 33 of the Arbitration Act is allowed as prayed for by the Petitioner and it is declared that Clause 9 of the Agreement dated 6-1-77 is invalid, void, ineffective, inoperative and of no legal effect and it does not confer any right on Respondent No. 1 i.e. ACME to refer any dispute or difference, arising between the parties for Arbitration to I.C.C. at Paris/Geneva. It is further held that Respondent No. 2 i.e. the Arbitrator has no power to proceed with Arbitration referred

to him under the invalid clause of the Agreement dated 6-1-77 and the Arbitration proceedings so far conducted by him under Rules of I.C.C., Court of Arbitration, are void ab initio, without jurisdiction and of no legal consequence. In view of the legal nature of the case, the parties are left to bear their own costs.

/S/

Civil Judge

Lahore

ANNOUNCED:

13-1-81

Certified that this Order consists of 7 pages.

Civil Judge

AFFIDAVIT

Islamic Republic of Pakistan
Province of the Punjab
Corporation of the City of Lahore
Consulate General of the
United States of America

ss;

Before me David C. Stewart consul of the United States of America at Lahore, Pakistan, duly commissioned and qualified personally appeared Mr. Ashtar Ausaf Ali, Attorney at Law who, being sworn, deposes and says as follows:

1. My name is Ashtar Ausaf Ali and I reside at Al-Abbas, 91-Garden Block, Garden Town, Lahore-16.

2. That I am an Advocate of the Lahore High Court, Lahore of 6 years standing and that I am duly qualified to give an opinion on the laws in Pakistan.

3. I graduated in law from the University of Punjab, Law College, Lahore and thereafter obtained a Master of Comparative Law Degree from George Washington University, Washington, D.C. I was appointed to the Panel of Arbitrators of the American Arbitration Association in 1982. I am also teaching a course in arbitration law at the University Law College for the last three years.

4. I have reviewed the award made by Mr. Max W. Abrahamson in the matter of American Construction Machinery and Equipment Corporation Limited Vs. Mechanised Construction of Pakistan Limited. In my opinion the statement in the award regarding Laws of Pakistan by the arbitrator in paragraphs 7 to 12 of the said award, are not correct and are based on mis-conception

and mis-interpretation of the Pakistan Laws in as much as;

a) Under the law applicable namely the Punjab Civil Courts Ordinance (II of 1962) promulgated on 8-1-1962, the court of Senior Civil Judge is a court having unlimited pecuniary jurisdiction and it can decide any matter or try any action irrespective of the amount involved in the dispute. In the province of Punjab, of which Lahore is a part, the High Court does not have any original civil jurisdiction and all civil actions are to be instituted in the civil court of Senior Civil judge and tried by the Civil judges. The value of Rs.20,000/ as fixed in the petition is only a notional value required to be stated by and it does

not in any manner affect the merits. Even otherwise under Section II of the Suits valuation Act (Act VII of 1887) the objection of the law of pecuniary jurisdiction has to be raised before the court trying the action and cannot subsequently be made the ground of attack in any other proceedings. The Court of Senior Civil judge was competent to try the petition.

b) That the order of the Civil Judge dated 13-1-81 has become final in Pakistan and in accordance with the law applicable, therefore, the same could not be set-aside, ignored or challenged by an Arbitrator. The order of the civil judge, even if it be assumed that the same was not legal, can only be

set-aside by the High Courts in Pakistan.

c) That the law declared by the Supreme Court is binding on all courts under Article 189 of the Constitution of Islamic Republic of Pakistan. The Arbitrator could not as such, nullify the effect of the judgement of the Supreme Court of Pakistan on PLD 1961 Supreme Court 573. The reference made by the Arbitrator of the case. G.M. Piaff A.G. Vs. Sartaj Engineering Company Ltd. reported in PDL 1971 Lahore 184 is highly in apt and uncalled for in as much as, the said judgement was set aside in appeal by the Supreme Court of Pakistan in the case reported in PLD 1971 Supreme Court 564.

d) That notwithstanding the amendment in the law of Arbitration (Protocol and Convention Act of 1937) by the Ordinance of 1962, no notification, to my knowledge, regarding the enforcement of award between Pakistan, United States of America and Switzerland has been issued. Similarly no notification has been issued with regard to the Cayman Islands. Even if any such notification exists it could not effect the matter since the award was delivered in Geneva and is being enforced in the United States of America and with regard these two countries there exists no such notification, reference may be made to the judgement of High Court in case reported in 1982 Civil Law Cases 2301.

e) That a court of competent jurisdiction in Pakistan in lis inter parties in which the arbitrator was also a party has already given a decision. It was not open to the Arbitrator, a respondent, before the Civil Court, to nullify the judgement without having taken proceedings before the higher forums in the hierarchy of courts in Pakistan.

/S/

Subscribed and sworn to before me this 2nd day of June, 1986.

David C. Stewart
Consul of the United
States of America

SUPPLEMENTARY AGREEMENT

BETWEEN MECHANIZED CONSTRUCTION OF PAKISTAN AND AMERICAN CONSTRUCTION MACHINERY & EQUIPMENT CORPORATION

This Supplementary Agreement between Mechanized Construction of Pakistan (hereinafter referred to as MCP) and American Construction Machinery & Equipment Corporation Limited, Grand Cayman, CAYMAN ISLANDS B.W.1 (hereinafter referred to as ACME), is in continuation of the Agreement signed between the two parties on 6th January, 1977 at Baghdad (hereinafter referred to as the Original Agreement). This Agreement is intended to cover the additional instructions and methods of operating the Original Agreement as per clause 13 of the Original Agreement and will be read in continuation of the

Original Agreement, except where specifically stated otherwise.

PART - A.

CLAUSE 1. ACME shall coordinate forwarding, transportation, clearing and commissioning of the machines for satisfactory performance by suppliers and coordination of settlement of any claims under warranty in respect of machines purchased by MCP for K-2 Project Iraq, and for which ACME will be paid compensation.

CLAUSE 2. ACME will keep effective liaison with suppliers, shippers, forwarders and insurers so as to ensure that the equipment is shipped and off-loaded and cleared at Baghdad in the shortest possible time and that no delays occur. For this purpose, ACME will maintain close liaison with

Project Manager K-2 and MCP Head Office as well.

CLAUSE 3. The suppliers, clearing agents and transporters etc., will be appointed by MCP in consultation with ACME and if appointed by MCP without consulting ACME, MCP will duly inform ACME of such appointments.

Clause 4. For carrying out the duties specified in the Original Agreement and this Agreement, ACME shall provide all necessary facilities within the scope of this Agreement.

CLAUSE 5. To provide efficient post delivery services of site, ACME will post qualified and competent personnel at the port of clearance in Iraq and at Project site to coordinate with MCP and suppliers for setting up of parts warehouses and

other services to be provided by suppliers in respect thereof and to coordinate training of MCP personnel at supplier's factories and at K-2 project site.

PART - B.

CLAUSE 7. The payment of compensation for ACME's services as per provisions of clause 5 of the Original Agreement, will be made by MCP in the manner prescribed herein based on the FOB value of the plants shown in Supplier's invoices and also shown in the annexure. This compensation will be paid through an irrevocable Letter of Credit, established by MCP in favor of ACME:-

i) 40% of the value of compensation on shipment of machines. ACME will supply to the Bank their own commercial invoices up to 40% of the compensation payable on shipment of machines along with copies of the manufacturer's invoices showing FOB values of the

machines and copies of the Bills of Lading.

ii) 30% of the payable compensation when machines reach K-2 job site. ACME will submit to the Bank their commercial invoices for claiming this amount along with manufacturer's invoices showing FOB value, copy of Bill of Lading and certificate from Project Manager, MCP, K-2 certifying that the machines have been received in complete condition.

iii) 20% of the compensation due after the warranty period of the machines is satisfactorily over. ACME will submit to the Bank their commercial invoices along with copies of manufacturer's invoices showing FOB value and certificate from Project Manager, MCP, K-2 certifying that the warranty period of the machine is satisfactorily over and that services to be performed by ACME have been satisfactorily performed.

iv) 10% of the payable compensation after the project period of K-2 is over. ACME will submit their invoices to the Bank along with copy of the manufacturer's invoices showing FOB value and certificate from Project Manager, MCP, K-2 certifying that ACME have

performed the duties satisfactorily under the Agreement.

PART C.

CLAUSE 8. The direct and out of pocket expenses as provided in clause 6 of the Original Agreement will be as follows:-

a) Expenses to be borne by ACME and not re-imbursable by MCP.

i) All overheads of ACME including telephones, accommodation, telex, traveling, transportation of documents and postal expenses etc.

ii) All expenses directly relating to the services to be rendered by ACME such as printing, issuance, purchase, advertising, despatch and transportation of documents by the quickest possible means relating to machinery for K-2.

iii) Any other expenses required to be incurred by ACME necessary for due performance of services which ACME has to provide under the Agreement.

iv) The cost on account of boarding, lodging, transportation, telephones, telexes etc., for MCP representative posted to work with ACME at New York for three

occasions during the period of the contract. Stay of such a representative will not exceed 3 months at a time, or ACME will provide above expenses for MCP representatives for 9 months. Any expenses incurred by MCP representative(s) at New York and not borne by ACME up to the extent provided above, will be recovered by MCP from ACME.

The income or proceeds received by ACME on behalf of MCP such as tender fee will be reimbursed to MCP.

b) Expenses borne by ACME and repayable by MCP to ACME.

All those expenses incurred by ACME on specific request of either Managing Director, MCP, Project Manager K-2 or other authorized representative of MCP and not covered under 8(a) above i.e. the expenses which are not incidental to services to be rendered by ACME for arranging machinery for K-2 project or any amount paid to MCP's personnel on specific request except to be

paid by ACME as per clause 8(a)(iv) above, or on account of any purchases made by ACME on specific request of MCP for supply of books, stationery, office equipment or any other materials, shall be reimbursed to ACME by MCP on production of original invoices from the suppliers for supply of goods and on production of ACME invoices for services rendered by ACME or payments made by them on behalf of MCP.

CLAUSE 9. Except as provided in the Schedule attached herewith, no further compensation under the original or this Agreement shall be claimed by ACME from MCP for purchase of machinery for K-2 Project, Iraq.

CLAUSE 10. Notwithstanding anything contained in the Original Agreement, this Agreement shall over-ride and prevail over

the provisions of the Original Agreement wherever there is any conflict between the provisions of the Original Agreement and this Agreement.

Clause 11. With respect to the performance of services by ACME in Iraq, the provisions of this Agreement shall be subject to the requirements of Iraqi laws.

CLAUSE 12. Subject to the above clause, this Agreement, as well as the Original Agreement, shall be governed by and be interpreted in accordance with the laws in Pakistan.

CLAUSE 13. In case of any default by ACME, in the performance of obligations under this and the Original Agreement, MCP shall be entitled to recover from ACME any losses or damages suffered by MCP on account thereof. Any such loss or damage

shall be recorded by Project Manager, MCP, K-2 while certifying the performance of ACME as per clauses 7(ii), (iii) and (iv) of the Supplementary Agreement and this loss or damage will be deducted from ACME's bill of compensation.

Signed at Lahore, Pakistan.

FOR AMERICAN CONSTRUCTION FOR MECHANISED MACHINERY & EQUIPMENT CONSTRUCTION OF CORPORATION, LTD. PAKISTAN

/S/ /S/

PRESIDENT AND MANAGING DIRECTOR MANAGING DIRECTOR

Witness /s/ Witness /s/

Lahore this 22nd day of May, 1978.

- AGREEMENT BETWEEN MCP AND ACME FOR THE PURCHASE AND SUPPLY OF MACHINERY AND RELATED SUPPLIES AND SERVICES FOR LOWER KHALIS PROJECTS, K-1 AND K-2 IN IRAQ.

It is hereby agreed between Mechanised Construction of Pakistan of Lahore Pakistan, hereinafter referred to as MCP and American Construction Machinery & Equipment Corporation Ltd. of Georgetown, Cayman Islands B.Wl, hereinafter referred to as ACME that:-

1) MCP hereby employs ACME as a Purchasing and Supply Agent for procurement of Machinery, Equipment and Related Items and services required for use by MCP as the Contractor for works to be performed at Lower Khalis, Iraq also known as K-2 and K-1 Projects. This agreement shall be valid only for the above mentioned contracts and during their subsistence.

2) ACME is given authority hereunder to procure, ship, deliver and prepare for use all such equipment and services according to price, specifications, inspection procedures, other conditions, delivery schedules & shipping arrangements approved by MCP and in pursuance of instructions and directions of MCP. All

goods supplied are subject to final approval of MCP which shall be entitled to reject any goods which are not in accordance with specifications and other conditions prescribed. It would be the responsibility of ACME to take all necessary and desirable measures to engage and supervise the transportation of machinery and supplies (from the source of purchase) to the job site. This will mean that ACME must provide competent and qualified personnel at Port of Shipment, the transhipment port of Kuwait or any other port used and at the job site at Lower Khalis.

All this must be accomplished within minimum stipulated period of time allowed by the MCP work schedule at Lower Khalis.

3) MCP under the terms and conditions of its contract with the Iraqi Government Authorities shall take all necessary steps to provide timely suitable letters of credit to ACME in a first class bank in a manner permitting their use by ACME as the base on which ACME can effect payments to suppliers of machinery, equipment and service on appropriate conditions.

4) ACME undertakes to negotiations for the MCP loan facilities at the best possible terms and conditions of payments at the lowest rate of bank interest available for the maximum benefit of MCP, including deferred payments.

5) In consideration of services rendered by ACME under this contract, MCP shall compensate ACME In the amount of 5% (five percent) on the first of the L.K. Projects and at 4% (four percent) on the second L.K. Project at the FOB (Free on Board) invoice value of all goods supplied. Such payments shall be effected by invoicing said remuneration as one of the items on the relative invoice and drawing for the amount due under provision of the covering letter of credit.

ACME shall ensure that it procures the goods at the most favourable prices, and any discount or commission allowed by manufacturer or supplier shall be for the benefit of MCP.

6) Letter of Credit from MCP in favor of ACME shall provide for ACME to invoice and draw on it for approved direct and out-of-pocket expenses (not forming a part of the normal overheads of ACME) not covered by invoices for goods and services and not covered by the preceding clause, by representation of invoices and supporting documents duly signed by a responsible official of ACME and countersigned by an authorized representative or employee of MCP. The terms for release of payments against letters of credit will be settled mutually separately.

7) Timeliness shall be the essence of this Agreement and of all subsequent actions taken under it by MCP and ACME for the supply of goods and services to MCP.

8) In the case of any defaults on the part of ACME in the performance of the terms and conditions of this agreement the MCP would be entitled to recover any loss resulting therefrom from ACME and may also proceeed to recind the contract in which case MCP shall not be liable for any claims relating to or arising from such cancellation.

9) Arbitration Any dispute or difference arising between the parties concerning the interpretation of any provision of this agreement or performance or any action taken thereunder shall be settled in the first instance directly between the parties and if no such settlement is possible by referring to the International Chamber of Commerce at Paris/Geneva for arbitration.

Provided that where the contract has not been rescinded, any difference or disputed matter requiring to be settled directly between the parties or by arbitration shall not affect the obligations of the parties to carry out the contract.

10) Freight Every effort will be made by ACME to secure the best and lowest freight rates on any and all shipments even in the case of an emergency shipment.

11) MCP reserves the right to make purchases from other sources when necessary in the interest of the Company.

12) Force Majeure Should ACME fail to discharge any part or responsibility under this contract due to Act of God, Government, State of Emergency, War Conditions, Strikes, Lock-outs or other causes beyond control of ACME it cannot be held liable or responsible for such force majeure.

13) This agreement shall take force and become effective automatically upon signing of the contract K-1, or K-2 by MCP and the Iraq Government Authority and shall remain in force until it is replaced by a fully conditioned regular Agreement which may expand but not denigrate, detract or abrogate from any of the fair and valid intent contained herein.

Signed at Lahore, Pakistan.

FOR AMERICAN CONSTRUCTION MACHINERY & EQUIPMENT CORPORATION
/S/
PRESIDENT

FOR MECHANISED CONSTRUCTION OF PAKISTAN
/S/
MANAGING DIRECTOR

Witness /s/ Witness /s/

6/1/77
Baghdad January 6, 1977

No. 87-1034

Supreme Court, U.S.
FILED
JAN 15 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

MECHANISED CONSTRUCTION OF PAKISTAN, LTD.,

Petitioner,

—v.—

AMERICAN CONSTRUCTION MACHINERY & EQUIPMENT CORPORATION, LTD.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR AMERICAN CONSTRUCTION MACHINERY & EQUIPMENT CORPORATION, LTD. IN OPPOSITION

GERALD AKSEN
Counsel of Record
CHRISTOPHER CONNOLLY
ANNE MARIE WHITESELL
REID & PRIEST
Attorneys for Respondent American Construction Machinery & Equipment Corporation, Ltd.
40 West 57th Street
New York, New York 10019
(212) 603-2000

Of Counsel:

GREGORY DE SOUSA
6 MacDonald Place
Scarsdale, New York 10583

QUESTION PRESENTED

Should confirmation of a foreign arbitral award be refused under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards because one party to the arbitration proceedings procures from its own local court, rather than from a court of competent jurisdiction in the territory of the arbitration, an ex parte judgment that purports to nullify the arbitration proceedings?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1034

MECHANISED CONSTRUCTION OF PAKISTAN, LTD.,

Petitioner,

—v.—

AMERICAN CONSTRUCTION MACHINERY & EQUIPMENT CORPORATION, LTD.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR AMERICAN CONSTRUCTION MACHINERY & EQUIPMENT CORPORATION, LTD. IN OPPOSITION

Petitioner Mechanised Construction of Pakistan, Ltd. ("MCP") seeks review of a decision by the United States Court of Appeals for the Second Circuit which affirmed the district court's opinion and order confirming a foreign arbitral award rendered in Switzerland in favor of respondent American Construction Machinery & Equipment Corporation, Ltd. ("ACME")[1] pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38, *reprinted in* 9 U.S.C.A. § 201 note (West Supp. 1987) (the "Convention"). ACME opposes the issuance of a writ of certiorari to

1 ACME has no parent companies, subsidiaries or affiliates.

review the decisions of the district court and the court of appeals because the decisions below were clearly correct, and petitioner's meritless allegations of public policy considerations provide no basis under U.S. law for U.S. courts to refuse to comply with this Nation's treaty obligation to confirm validly rendered foreign arbitral awards.

OPINIONS BELOW

The opinion of the court of appeals (Pet. A1-A2) is unreported. The opinion of the District Court for the Southern District of New York (Pet. A3-A19) is reported at 659 F. Supp. 426.

JURISDICTION

The alleged jurisdictional requisites are set forth in the petition at page 2.

TREATY AND STATUTES INVOLVED

1. The pertinent provisions of Article V of the Convention are set forth in the petition at pages 3-4. Article I(1) of the Convention provides:

> This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

2. The pertinent provisions of the United States Arbitration Act ("USAA"), 9 U.S.C. § 1 *et seq.*, are Section 201, which is

set forth in the petition at page 3, and Section 207, which provides:

> Within three years after an arbitral award falling under the Convention is made, any party to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming the award as against any other party to the arbitration. The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention.

STATEMENT OF THE CASE

In January 1977, ACME, a Cayman Islands corporation with its principal place of business in New York, and petitioner MCP, a state-owned instrumentality of the Government of Pakistan, entered into an agreement whereunder ACME was employed as a purchasing and supply agent for procurement of goods and services for use by petitioner in connection with construction projects in Iraq (the "1977 Agreement"). Pet. A4, A82-A86. The parties expressly agreed in Paragraph 9 of the Agreement that any disputes between them were to be resolved by arbitration:

> *Arbitration* Any dispute or difference arising between the parties concerning the interpretation of any provision of this agreement or performance or any action taken there-under shall be settled in the first instance directly between the parties and if no such settlement is possible by referring to the International Chamber of Commerce at Paris/Geneva for arbitration. (Pet. A5, A85.)

The 1977 Agreement, which was signed by both parties in Baghdad, Iraq (Pet. A72), did not contain a governing law provision. In 1978, the parties subsequently entered into a supplementary agreement (the "1978 Supplementary Agreement") (Pet. A72-A81) which MCP exacted from ACME

under economic duress (Pet. A40). This agreement provided in clause 12 that both the 1977 Agreement and the 1978 Supplementary Agreement were to be governed by the law of Pakistan. Pet. A5, A80.

Because petitioner did not make payment as promised (A40), ACME filed a request for arbitration with the International Chamber of Commerce (ICC) on May 1, 1979 pursuant to the 1977 Agreement. Pet. A5. Petitioner thereafter participated in the arbitration proceedings for well over a year without raising any objections to the ICC's jurisdiction. First, on June 24, 1979, petitioner filed with the ICC both a reply and a counterclaim of $1 million. Pet. A5. Second, MCP confirmed acceptance of the 1977 arbitration clause and consented to have the ICC Court of Arbitration select the arbitrator. Pet. A14, A27-28. Third, after the ICC Court of Arbitration selected Geneva as the locale of the arbitration (Pet. A32) and appointed a sole arbitrator in September 1979 (Pet. A5-A6, A25), petitioner designated an authorized representative who, on March 19, 1980, signed the Terms of Reference describing the scope of the arbitration and the issues to be decided (Pet. A6, A21-A25).

Under the Terms of Reference, "the jurisdiction of the Arbitrator to determine finally the issues referred to in these Terms of Reference was accepted on behalf of the parties." Pet. A28. MCP specifically agreed to arbitrate the issue of the validity of the 1978 Supplementary Agreement. Pet. A6. The Terms of Reference stated in pertinent part:

> The issues to be determined in this arbitration are:
>
> > What compensation (if any) is due or will become due by the Respondent to the Claimant under the Agreement of 6th January 1977 as validly affected (if at all) by the Agreement of 22nd May 1978, and on what terms of payment?

Pet. A24. Petitioner further agreed in the Terms of Reference to Geneva as the place of arbitration (Pet A32-A33) and the use of the procedural rules of Geneva. Pet. A14-A15.

On July 29, 1980, more than thirteen months after first participating in the arbitration and after the arbitrator had set a hearing date, petitioner alleged for the first time that the arbitration agreement and the arbitration proceedings were invalid under the law of Pakistan. Pet. A25-A26. Only after having expressly consented in the Terms of Reference to the arbitrator's jurisdiction did MCP, a Pakistani entity, petition a local court in Lahore, Pakistan for a declaration invalidating both the arbitration agreement and the arbitration proceedings. Pet. A7, A27. MCP's petition, which the arbitrator found to be "extremely misleading" due to "omissions and positive misstatements" concerning petitioner's prior participation in the arbitration (*id.*), was granted in January 1981 after proceedings in which neither ACME nor the arbitrator appeared. Pet. A7, A27-28. The arbitration hearings took place in Geneva on June 1 and 2, 1981 without the attendance of MCP, which had been given proper notice of the hearing date but chose not to appear. Pet. A6, A33.

In the award rendered on May 24, 1982 (the "Award"), the arbitrator determined that the 1978 Supplementary Agreement, including the Pakistani governing law provision, was invalid under both Pakistani and New York law on the grounds of economic duress and lack of consideration (Pet. A39-A40), and that New York law governed the 1977 Agreement (Pet. A8, A45). The arbitrator further found that even if Pakistani law were applicable, MCP's objections to his jurisdiction were without merit. Pet. A8, A32. The arbitrator decided in favor of ACME on its claim, and dismissed MCP's counterclaim. Pet. A7. MCP did not appeal the Award to any Swiss court.

On May 17, 1985, ACME filed a petition in the district court below to confirm the Award pursuant to 9 U.S.C. § 207. Pet. A8. MCP first moved to dismiss ACME's petition on the grounds, *inter alia*, of lack of jurisdiction. The district court denied MCP's motion on all grounds in its Opinion and Order dated February 28, 1986 (the "February 1986 Opinion"), which petitioner did not appeal. Resp. 1a-11a. The district court subsequently issued its decision dated March 23, 1987 confirm-

ing the Award (Pet. A3-A19), and on April 6, 1987 entered judgment in the amount of $2,793,962.39 in favor of ACME. Resp. 12a-13a. The court of appeals heard argument on petitioner's appeal from the judgment on September 2, 1987, and unanimously affirmed the district court's decision in a per curiam opinion on September 14, 1987. Pet. A1-A2.

REASONS FOR DENYING THE WRIT

REVIEW IS NOT WARRANTED BECAUSE THE COURTS BELOW ACTED IN ACCORDANCE WITH THE TREATY OBLIGATION OF THE UNITED STATES TO RECOGNIZE FOREIGN ARBITRAL AWARDS

This case involves the U.S. treaty obligation to enforce a foreign arbitral award that petitioner concedes falls under the Convention, a global multilateral treaty ratified by over 70 countries which requires contracting states to recognize arbitral awards rendered in the territory of other contracting states such as Switzerland, where the Award was rendered. This Court has stated:

> The goal of the Convention, and the principal purpose underlying American adoption and implementation of it, was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries.

Scherk v. Alberto-Culver Co., 417 U.S. 506, 520 n.15 (1974). In order to facilitate the enforcement of arbitral awards, Article V of the Convention provides that recognition of awards may be refused only in certain prescribed situations, and the Congressional legislation implementing the Convention and codified in Chapter 2 of the USAA (9 U.S.C. §§ 201-208) mandates that a U.S. court "shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention."

Id. § 207. Here, the district court confirmed the Award because it correctly determined that none of the Article V grounds raised by petitioner to deny recognition existed.

Petitioner does not claim that any conflict among the courts of the United States in the interpretation and construction of Article V justifies the Court's review of this case. Indeed, MCP admits that "there exists a long standing tradition of courts since the enactment of the" USAA "to overturn arbitration awards subsequently issued in only extremely limited circumstances." Pet. 22. Uniform judicial recognition of the "general pro-enforcement bias" underlying the Convention has led the courts to construe the Article V defenses narrowly, because "a narrow construction would comport with the enforcement-facilitating thrust of the Convention." *Parsons & Whittemore Overseas Co. v. Societe Generale de l'Industrie du Papier (RAKTA)*, 508 F.2d 969, 973, 976 (2d Cir. 1974). Further, the U.S. judiciary has acknowledged that "the burden of proving that an award should be overturned is on the party challenging the enforcement and recognition of the award. . . ." *La Societe Nationale v. Shaheen Natural Resources Co.*, 585 F. Supp. 57, 61 (S.D.N.Y. 1983), *aff'd*, 733 F.2d 260 (2d Cir.), *cert. denied*, 469 U.S. 883 (1984); *accord Imperial Ethiopian Gov't v. Baruch-Foster Corp.*, 535 F.2d 334, 336 (5th Cir. 1976). Accordingly, the decisions below did not, contrary to petitioner's contention, create a precedent that would "subject" the Article V defenses to recognition "to an unduly burdensome restrictive interpretation." Pet. 13. The courts below merely applied well-established legal principles in accordance with the purpose and language of both the Convention and the USAA.

Moreover, the district court's rejection of MCP's Article V defenses was totally justified on the merits. Petitioner argues that under Article V(1)(a) "the [arbitration] agreement is not valid under the law to which the parties have subjected it" because MCP obtained, after having first expressly accepted the arbitrator's jurisdiction, an ex parte Pakistani court judgment declaring the 1977 Agreement's arbitration clause invalid

under Pakistani law. Pet. 23-26. The arbitrator expressly found, however, that the 1978 Supplementary Agreement, including the Pakistani governing law provision, was invalid due to economic coercion and lack of consideration (Pet. A39-A40), and that New York law governed the 1977 Agreement. Pet. A8, A45. The district court therefore properly rejected MCP's Article V(1)(a) defense because to transform Pakistani law into "the law to which the parties have subjected" their arbitration agreement would have required the court to reverse the arbitrator's express findings of law, in violation of the settled rule that neither Article V(1)(a) nor the other Convention defenses can be invoked "as a license to review the record of arbitral proceedings for errors of fact or law—a role which we have emphatically declined to assume in the past and reject once again." *Parsons & Whittemore*, 508 F.2d at 977; *see* Pet. A12. The determination of the courts below that the arbitrator's findings were binding is plainly correct. *See Northrop Corp. v. Triad Int'l Mktg. S.A.*, 811 F.2d 1265, 1268-69 (9th Cir. 1987); *Andros Compania Maritima, S.A. v. Marc Rich & Co.*, 579 F.2d 691, 704 (2d Cir. 1978) ("When arbitrators explain their conclusions . . . in terms that offer even a barely colorable justification for the outcome reached, confirmation of the award cannot be prevented by litigants who merely argue, however persuasively, for a different result.").[2]

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2 Petitioner's reliance (Pet. 11, 24-25) on the legal conclusions in the June 2, 1986 affidavit of a Pakistani attorney (Pet. A65-A71), who challenges the correctness of the arbitrator's findings as to the validity of the 1977 arbitration agreement under Pakistani law, is therefore misguided. The courts below correctly rejected MCP's endeavor to challenge the Award through legal arguments which petitioner could have properly presented, but chose not to present, to the arbitrator. Moreover, the affidavit, at most, alleges that the arbitrator erred in his understanding of applicable Pakistani law in connection with the validity of the 1977 arbitration clause. Even if the arbitrator had erred, however, his findings would be non-reviewable in U.S. courts. *Parsons & Whittemore*, 508 F.2d at 977. Interestingly, the affidavit does not dispute the arbitrator's findings of law as to the invalidity under Pakistani law of the 1978 Supplementary Agreement, which contained the Pakistani governing law provision, on the grounds of economic coercion and lack of consideration.

The two other Article V(1) defenses cited in the petition are similarly devoid of merit. MCP's claim (Pet. 27) that the Award "contains decisions on matters beyond the scope of the submission to arbitration" under Article V(1)(c) is erroneous because, as the district court held, "there is no doubt that MCP consented to arbitration of the matters ultimately decided by the Arbitrator" when it "signed the Terms of Reference which set forth the issues to be arbitrated." Pet. A13-A14. Finally, MCP's assertion (Pet. 26-27) under Article V(1)(e) that the Award "has been set aside or suspended by a competent authority of the country . . . under the law of which that award was made" mistakenly relies on the ex parte Pakistani court judgment to show that the arbitration proceedings in which both petitioner and ACME had participated were invalid. The courts below correctly held that the only competent national authority that could have set aside or suspended the Award was Swiss, because the Award—as expressly agreed to by MCP in the Terms of Reference—was rendered in Geneva pursuant to the procedural law of Geneva. Pet. A15.

Apparently aware that neither the Convention nor the legislation implementing it nor the U.S. jurisprudence construing it affords any grounds for denying recognition to the Award, petitioner alleges that "important public policy considerations," "dramatic political repercussions" and "foreign policy ramifications" (Pet. 14, 15) nonetheless warrant review of the decisions below. MCP conjures these phantoms by implying that the "unique fact pattern" of its status as a state-owned instrumentality of Pakistan, a country that is not a Convention signatory, somehow justifies U.S. judicial deference to an ex parte Pakistani court judgment, which MCP procured in order to nullify the very arbitration proceedings in which it had participated. *See* Pet. 15, 23, 31, 33. All of petitioner's arguments in support of this flawed proposition ignore the interwoven treaty, statutory and jurisprudential framework which requires the enforcement of both the Award and the international arbitration agreement into which MCP freely entered.

The basic premise of petitioner's reasons for seeking review—that this case allegedly involves "a question of first impression" because "it shall have the effect of according to foreign arbitral awards, demonstrably improperly obtained, a greater degree of enforceability and effect than judgments of courts of foreign states" (Pet. 12-13)—is misconceived for at least two reasons. First, MCP's contention that the Award was improperly obtained turns the facts of this case upside down: it was the Pakistani court proceedings which the arbitrator found to be marked by MCP's "omissions and positive misstatements." Pet. A7, A27. Second, and more importantly, petitioner's assertion that the decisions below were novel is simply wrong. The principal purpose and effect of the Convention, as the courts below recognized, is precisely to give foreign arbitral awards a greater degree of enforceability and thereby promote the use of arbitration. *See Scherk*, 417 U.S. at 520 n.15. Arbitral awards such as the one here are intended to be more easily enforceable in the United States than foreign court judgments which the United States is not bound to enforce under treaty obligations. Since the United States acceded to the Convention in 1970, U.S. courts have consistently confirmed foreign arbitral awards and this Court has consistently upheld the enforceability of international arbitration agreements, *e.g.*, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (federal antitrust claims arbitrable under international arbitration agreement); *Scherk*, *supra* (federal securities law claims arbitrable).

MCP's further contention (Pet. 14) that recognition of the Award infringes upon its rights as a Pakistani government-owned instrumentality as defined in the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. §§ 1602-1611, is equally specious. The FSIA, which provides foreign states and their instrumentalities with immunity from suit in U.S. courts if none of the specified exceptions to immunity exists, did not insulate MCP from the jurisdiction of the courts below. The district court specifically rejected in the February 1986 Opinion petitioner's contention that it was entitled to immunity under

the FSIA (Resp. 4a-7a, 9a), and MCP never appealed that decision. Further, because MCP's activities in the United States in connection with the 1977 Agreement were purely commercial in nature (Resp. 6a-7a), its status as a state-owned instrumentality is no bar to award enforcement proceedings under U.S. law. *See* 9 U.S.C. § 202 ("arbitral award arising out of a legal relationship . . . which is considered as commercial . . . falls under the Convention").

Petitioner's repeated references (Pet. 15, 31, 32) to the fact that Pakistan is not a party to the Convention are irrelevant to the issue of the Award's confirmation. The Convention unambiguously provides in Article I(1) that it applies to arbitral awards rendered, as here, in the "territory of a State other than the State where the recognition and enforcement of such awards are sought", regardless of whether the governments of the parties to the arbitration agreement are contracting states. *La Societe Nationale*, 585 F. Supp. at 64. Indeed, MCP did not appeal the district court's rejection in the February 1986 Opinion of MCP's contention that confirmation proceedings were inappropriate because MCP is an instrumentality of a Convention non-signatory. Resp. 7a-8a. Furthermore, MCP's assertion (Pet. 31) that confirmation of the Award against it "create[s] an apparent equitable, if not legal, anomaly" is unfounded. U.S. courts have consistently confirmed awards in favor of foreign states and instrumentalities of foreign states which have not acceded to the Convention. *E.g.*, *Imperial Ethiopian Gov't*, *supra*; *La Societe Nationale*, *supra*. When, as here, a foreign state instrumentality has expressly consented to arbitration in the territory of a Convention signatory, it would be truly anomalous if that entity could employ the Convention as a shield to seek denial of recognition of an award against it. *See* Resp. 8a.

MCP also mistakenly relies on Article V(2)(b) of the Convention, which permits non-recognition of an award when such recognition "would be contrary to the public policy of the [forum] country." *See* Pet. 28. It is well-recognized under U.S. law that "[e]nforcement of foreign arbitral awards may be

denied on this basis only where enforcement would violate the forum state's most basic notions of morality and justice." *Parsons & Whittemore*, 508 F.2d at 976; *see Northrop Corp.*, 811 F.2d at 1271 (public policy must be "well defined and dominant"). The courts below correctly rejected petitioner's contention that the ex parte Pakistani judgment procured by MCP implicated a U.S. public policy interest contrary to the Award's enforcement.

Indeed, in *Scherk v. Alberto-Culver Co.*, *supra*, this Court deplored, as destructive of the process of international dispute resolution, the actions of parties such as MCP in resorting to their national courts to petition for release from their contractual obligation to arbitrate:

> A parochial refusal by the courts of one country to enforce an international arbitration agreement . . . would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages. In the present case, for example, it is not inconceivable that if Scherk had anticipated that Alberto-Culver would be able in this country to enjoin resort to arbitration he might have sought an order in France or some other country enjoining Alberto-Culver from proceeding with its litigation in the United States. Whatever recognition the courts of this country might ultimately have granted to the order of the foreign court, the dicey atmosphere of such a legal no-man's-land would surely damage the fabric of international commerce and trade, and imperil the willingness and ability of businessmen to enter into international commercial agreements.

417 U.S. at 516-17. Accordingly, the district court correctly determined that U.S. "public policy would be violated if the Court declined to confirm the award," because MCP had procured a local ex parte judgment in an attempt to circumvent international arbitration proceedings to which petitioner had agreed, and in which it had participated. Pet. A16-A17.

U.S. public policy, as the courts below recognized, requires deference to arbitral awards which the United States is committed by treaty to enforce when rendered in the territory of Convention signatories such as Switzerland. This Court has stated that "concerns of international comity [and] respect for the capacities of foreign and transnational tribunals . . . require that we enforce the parties' [arbitration] agreement, even assuming that a contrary result would be forthcoming in a domestic context." *Mitsubishi Motors Corp.*, 473 U.S. at 629.[3] These concerns are equally applicable to the enforcement of Convention awards.

The decisions of the courts below to confirm the Award are fully consistent with U.S. law and this Nation's treaty obligation under the Convention to recognize validly rendered foreign arbitral awards. Review of the judgment in favor of ACME is therefore not warranted.

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3 Petitioner's continued reliance (Pet. 34-35) on *Wilko v. Swan*, 346 U.S. 427 (1953), is mystifying. The district court below noted that MCP's reliance on *Wilko* (which held that claims arising under the Securities Act of 1933 were non-arbitrable in domestic arbitration cases) is completely misplaced because this Court held in *Scherk* and *Mitsubishi Motors* that federal statutory claims arising under international agreements such as the 1977 Agreement are arbitrable pursuant to a broad arbitration clause. Pet. A17-A18.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

GERALD AKSEN
Counsel of Record

CHRISTOPHER CONNOLLY
ANNE MARIE WHITESELL
REID & PRIEST
Attorneys for Respondent
American Construction Machinery
& Equipment Corporation, Ltd.
40 West 57th Street
New York, New York 10019
(212) 603-2000

Of Counsel:

GREGORY DE SOUSA
6 MacDonald Place
Scarsdale, New York 10583

New York, New York
January 13, 1988

APPENDIX

Opinion and Order

85 Civ. 3765 (JFK)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AMERICAN CONSTRUCTION MACHINERY & EQUIPMENT CORPORATION, LTD.,

Petitioner,

—against—

MECHANISED CONSTRUCTION OF PAKISTAN LTD.,

Respondent.

APPEARANCES:

For Petitioner:

Reid & Priest
New York, New York
Of Counsel: Gerald Asken, Esq.

For Respondent:

Dunn & Zuckerman, P.C.
New York, New York
Of Counsel: Peter Bellsey, Esq.

JOHN F. KEENAN, *United States District Judge*:

Petitioner, ACME seeks to have a foreign arbitration award confirmed. ACME is a Cayman Islands corporation with an office in Westchester County. At the time of the relevant

activities, the office was in Tarrytown. MCP is a wholly-owned enterprise of the government of Pakistan. On January 6, 1977, the parties entered into a contract, the terms of which provided for ACME to supply MCP with goods and services to be used for MCP's construction project in Iraq. The contract was entered into in Lahore, Pakistan. In the petition to confirm, the motion to dismiss and the opposition papers, no party disputed that the contract provided for arbitration in either Paris or Geneva, as set forth in ¶ 9 of the 1977 agreement. (First Bellsey Aff., ¶ 4). However, MCP, in its reply papers, states that in January 1981, sixteen months before the arbitration award was issued by the arbitrator in Geneva, a Pakistani court issued a declaratory judgment to the effect that the arbitration clause contained in ¶ 9 of the agreement was "invalid and ineffective." (Reply Memo, p. 8; Declaratory Judgment ¶ 7, Ex. 3 to Second Bellsey Aff.).

Although the 1977 agreement was modified and superseded in 1978, MCP itself says that the second contract is "not at this juncture relevant to the instant proceedings." (First Bellsey Aff., ¶ 5). After a breach of contract, the parties went to arbitration in Geneva. On May 24, 1982 a final, allegedly binding decision was rendered, awarding ACME $1,402,924 plus 17% interest calculated from "22nd December . . . until payment, and arbitration costs. (Award, ¶ 31, Ex. C to First Bellsey Aff.).

ACME brought this petition to confirm the award in the Southern District of New York. MCP moves to dismiss the petition on three grounds.

1. *Lack of subject matter jurisdiction*: MCP is the instrumentality of a foreign sovereign as defined by the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1602 et seq. MCP argues that under the FSIA it is only subject to suit in this country if one of the exceptions to the general grant of immunity applies to it. MCP asserts that none of the exceptions apply. ACME argues that two of the exceptions apply, namely, that which provides for jurisdiction when the foreign sovereign or instrumentality thereof has "waived" its immu-

nity, § 1605(a)(1), done herein, ACME asserts, by MCP's submitting to foreign arbitration in the first place. The other exception alleged to apply pertains to "commercial activity" by the foreign instrumentality. ACME asserts that MCP engaged in commercial activity by visiting New York for negotiations in the summer of 1977 (Raymond Aff., ¶ 6); remaining in New York for up to six months and using the ACME office in New York for negotiations with suppliers (Raymond Aff., ¶ 7); using ACME's New York address as its own for advertising purposes (Raymond Aff., ¶ 4); soliciting bids in the New York Times on March 3, 4 and 7, 1977 (Raymond Aff., ¶ 5); effecting payments by use of letters of credit issued from New York branches of Pakistani banks, worth $30,000,000 (Raymond Aff., ¶ 8); using United States mail, phone and telegraph for the purpose of communicating with its United States agent, ACME (Raymond Aff., ¶¶ 3 and 9).

MCP also argues that Pakistan has never ratified the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the Convention"), and therefore cannot be made party to an action falling under the Convention. The district court has original jurisdiction over actions or proceedings arising under the Convention pursuant to 9 U.S.C. § 203, which MCP asserts cannot be exercised with respect to it, a non-ratifying instrumentality. ACME, on the other hand, asserts that the terms of the Convention state that jurisdiction shall lie when the arbitral award is made in the "territory of a State other than the State where the recognition and enforcement" is sought, Convention, Article I. Sections 203 and 207 of Title 9 providing for jurisdiction and power to issue confirmation awards implement the Convention, including the language of Article I. ACME argues that since the situs of the award was Switzerland, and Switzerland is a signatory to the Convention, the award may be enforced in the United States regardless of whether Pakistan is a signatory to the Convention. MCP points out that each of these cases involved non-signatory plaintiffs seeking to confirm awards pursuant to the Convention, as opposed to the instant case, in which the defendant against whom confirmation is sought is the non-

signatory. Thus, MCP argues that the Convention was used "offensively," not "defensively."

2. *Lack of venue*: MCP asserts that venue does not lie in the Southern District of New York.

ACME asserts venue is proper under the Convention, which allows a petition to confirm to be brought in a federal district court where, *absent* arbitration proceedings, a civil action between the parties could be brought. 9 U.S.C. § 204. ACME argues that an action could have been instituted in the Southern District of New York because a substantial part of the events giving rise to the claim, including MCP's failure to pay, arose in New York.

Moreover, ACME argues that venue is proper here under the venue provision of 28 U.S.C. § 1391(f)(3), which sets forth venue criteria for suits against non-immune foreign sovereigns or their instrumentalities, as defined in the FSIA. This section states that venue will lie in any district where the agent or instrumentality is "licensed to do business or is doing business." MCP says that first, it is immune, as discussed above, and second, that it is not licensed to do business nor doing business in the Southern District of New York. It also asserts that no action could have been brought against it under the Convention, as described in the proceeding section, because MCP is not subject to personal jurisdiction here.

3. *Lack of personal jurisdiction*: MCP asserts that due to lack of "minimum contacts" with this district, it is not subject to personal jurisdiction in the Southern District of New York.

DISCUSSION

1. Subject Matter Jurisdiction

A. *Is MCP immune from suit under FSIA?*

The FSIA indeed would cause MCP to be immune from suit, unless one of five statutory exceptions to immunity is deemed applicable. Two of the five appear relevant.

28 U.S.C. § 1605(a) states, "a foreign state shall not be immune from the jurisdiction of [United States courts] in any

case . . . (1) in which the foreign state has waived its immunity either explicitly or by implication . . . . "ACME argues that since MCP entered into the arbitration proceedings in Geneva to the extent of filing a counterclaim, attending a pre-arbitral hearing, and signing the International Chamber of Commerce "terms of reference" (Petition to Confirm, ¶ 11), even though it did not appear at the arbitration, it waived its immunity by participating in foreign arbitration.

MCP argues in its reply papers that it had received a declaratory judgment from a Pakistani court 16 months before the Geneva arbitration took place, which stated that the arbitration clause in the 1977 agreement was invalid. Having read the arbitrator's award (Ex. 3 to Second Bellsey Aff.), it appears that the declaratory judgment obtained in Pakistan was gravely suspect. It arose when MCP brought an action against ACME and the arbitrator himself almost a year after MCP confirmed acceptance of the arbitration clause, and agreed to appointment of a sole arbitrator both in its answer to the request for arbitration and in a letter dated February 11, 1980. The authorized attorney for MCP also signed the "terms of reference" on March 19, 1980. The arbitrator noted, too, that MCP filed a cursory counterclaim in its June 24, 1979 reply to the request for arbitration. (Award, ¶ 17). The declaratory judgment issued on January 13, 1981, though neither defendant had appeared in the case. In fact, the arbitrator states that he was not informed of the decision until March of 1981, well after the decision issued. (Award, ¶ 6).*

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* While the substantive question of the validity of the arbitration clause is not actually before the court at this time, it is significant that the arbitrator's award thoroughly analyzes and criticizes the substantive analysis in the declaratory judgment. According to the arbitrator, MCP's documents supporting the petition before the Pakistani court were "extremely misleading", in that they did not disclose the true state of Pakistani law, and failed to state that MCP had confirmed acceptance of the arbitration clause as detailed above. The arbitrator further noted that the 1978 agreement, which MCP asserts is "not relevant" on this motion, contained a provision stating that the law of Pakistan should govern the parties. The arbitrator cited to Pakistani case and statutory law before determining that the governing law

The declaratory judgment of the court in Pakistan was severely criticized, and eventually discounted by the arbitrator. This Court determines that by engaging in most aspects of the arbitration, MCP waived its right to immunity under the FSIA. As stated in *Ipitrade International* v. *Federal Republic of Nigeria*, 465 F. Supp. 824 (D.D.C. 1978):

> The legislative history of [§ 1605(a)(1)] expressly states that an agreement to arbitrate or to submit to the laws of another country constitutes an implicit waiver. H. Rep. No. 94-1487, 94th Cong. 2d Sess., *reprinted in* [1976] U.S. Code Cong. & Admin. News, at 6604, 6617 . . . . This waiver cannot be revoked by a unilateral withdrawal.

Ipitrade at 826.

Even if waiver did not occur, ACME falls back on a second subsection of the FSIA, which provides for jurisdiction despite the general grant of immunity when "the action is based upon a commercial activity" carried on in the United States by the foreign state." § 1605(a)(2). In *Ministry of Supply, Cairo* v. *Universe Tankships*, 708 F.2d 80 (2d Cir. 1983), the Court of Appeals for the Second Circuit found that the first clause of § 1605(a)(2) "withdraws immunity with respect to claims based not only on acts within the United States but also with respect to acts outside the United States if they comprise an integral part of the state's 'regular course of commercial conduct' or 'particular commercial transaction' 'having substantial contact with the United States." *Ministry of Supply* at 84. Similarly, it has been held that in the case where the actual commercial activity consisted of negotiation and ultimate formation of a contract in the United States, some part of which contract was to be performed in the United States, the first clause of

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clause could not be controlling, in that the 1978 agreement was wholly coerced under threat of "financial ruin" to ACME, and without new consideration to support the new contract having been offered. (Award, ¶¶ 22-26). The arbitrator also determined that even if the law of Pakistan had applied, the arbitrator still would have had jurisdiction over the dispute. (Award, ¶¶ 8-12).

§ 1605(a)(2) applied, and no immunity existed. *Gibbons* v. *Udaras na Gaeltachta*, 549 F. Supp. 1094, 1111 (S.D.N.Y. 1982). All of ACME's duties under the contract were to be performed in the United States. Much of the contract was negotiated in this country, according to ACME's statement of the facts, which, in the context of this motion to dismiss, is to be granted great weight. Thus, under the holdings of *Ministry of Supply* and *Gibbons*, MCP engaged in "commercial activity" in the United States which lifted the veil of immunity provided by the FSIA. § 1605(a)(1) and § 1605(a)(2) both create exceptions from the general immunity which would otherwise apply to MCP.

B. *Is MCP subject to suit under the Convention?*

The language of Article I of the Convention provides in relevant part:

> This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought.

Arbitration panels sitting in the territory of members states have repeatedly had their awards confirmed, even when one of the parties to the arbitration has not ratified the Convention. In *La Societe Nationale Pour La Recherce* v. *Shaheen Natural Resources*, 585 F. Supp. 57 (S.D.N.Y. 1983), *aff'd* 733 F.2d 260 (2d Cir.), *cert. denied*, 105 S.Ct. 251 (1984), the district court rejected the argument that the Convention was inapplicable to a citizen of a country which had not ratified the Convention, stating:

> [this] reasoning is inconsistent with the unambiguous language of the Convention which provides that the Convention applies to arbitral awards made in the "territory of a state other than the State where the recognition and enforcement of such awards are sought." Convention, Article 1, 9 U.S.C. § 201. *The focus of this article to the Convention is not on the nationality of the party*

seeking to enforce the award but on the situs of the arbitration.

La Societe at 64, emphasis added.

Similarly, in *Jugometal* v. *Samincorp, Inc.*, 78 F.R.D. 504 (S.D.N.Y. 1978), a foreign arbitration award was confirmed even though Yugoslavia was not a party to the Convention. The country where the arbitration had taken place, France, had ratified the Convention, and the court determined that subject matter jurisdiction to "recognize and enforce" the arbitration award therefore existed. *Jugometal* at 506.

MCP argues that in *La Societe* and *Jugometal*, as well as in other cases cited by plaintiff, non-ratifying plaintiffs were allowed to use the Convention offensively. MCP distinguishes its own case on the grounds that here it is the defendant which is a non-ratifying instrumentality, yet which is being subjected to enforcement of the Convention. MCP cites no cases which support its argument that the provision of § 201 as interpreted by Judge Duffy of this court in *La Societe* should not apply in this defensive situation. Precedent as well as the language of the statute and common sense dictate that the focus of the inquiry is the situs of the country in which arbitration took place, and its accession to the Convention. Whether it is plaintiff or defendant who seeks to invoke the situs rule is irrelevant to the inquiry. This Court has subject matter jurisdiction to confirm the petition.

2. Venue

A. *Is venue proper under the Convention?*

9 U.S.C. § 204 provides for venue over cases involving the Convention in two possible types of districts. Of these two, one applies to the instant case. Under § 204, venue exists in any federal district court "in which save for the arbitration agreement an action or proceeding with respect to the controversy between the parties could be brought."

MCP asserts that it could not have been sued in the Southern District of New York absent arbitration proceedings, because it

is immune from suit under the FSIA, and because it does not have the requisite "minimum contacts" with this district such as would allow for personal jurisdiction over it in the Southern Dis[t]rict. As pointed out above, MCP has waived its right to immunity by participating in the arbitration in Geneva, and could be sued in this district if it has the appropriate contacts. The question of minimum contacts is discussed in section 3, below.

B. *Is venue proper under the statute providing for venue generally in civil actions against a foreign state?*

28 U.S.C. § 1391(f)(1) states that venue in civil actions against a foreign state exists "in any judicial district in which a substantial part of the events or omissions giving rise to the claim occurs . . . ." ACME alleges that a substantial part of the claim arose here, including MCP's failure to pay as contracted in the 1977 agreement. On this motion to dismiss, the court must of course give credence to plaintiff's statement of the facts. Given all the factors described in the context of the discussion on "commercial activity," see pp. 3, 4 and 9, *supra*, it is evident that the acts of negotiation, issuance of letters of credit, performance of procurement and solicitation of bids took place in the Southern District of New York. These acts, as well as non-payment, constitute a "substantial part" of the events giving rise to the claim, so as to create venue under § 1391(f)(1).

Venue is thus appropriate in the Southern District of New York, under 9 U.S.C. § 204 and 28 U.S.C. § 1391(f)(1).

3. Personal Jurisdiction

MCP argues that the constitutionally required "minimum contacts" do not exist in this case such as to enable this Court to exercise personal jurisdiction over the defendant. As a preliminary matter, it is not clear that "contacts" between the United States and the defendant are required where the judgment sought is simply the enforcement of an award rendered in a foreign jurisdiction where the defendant had the opportunity

to appear and contest the entry of judgment, as was the case here. The seminal case of *Shaffer* v. *Heitner*, 433 U.S. 186 (1977) may have some bearing on this matter. The Court observes that the *Shaffer* decision hinged on the jurisdictional issue of property within the district, and concerned the enforceability of a domestic state judgment, and may not be applicable to the other forms of "minimum contacts" or to enforcement of an arbitral award based on treaty. Given the fact that *Shaffer* is potentially distinguishable, the Court will proceed with the personal jurisdiction analysis. Nevertheless, the Court notes that the *Shaffer* Court stated:

> Once it has been determined by a court of competent jurisdiction that the defendant is a debtor of the plaintiff, there would seem to be no unfairness in allowing an action to realize on that debt in a State where the defendant has property, whether or not that State would have jurisdiction to determine the existence of the debt as an original matter.

Shaffer at 210-11, n.36.

MCP asserts that it did not enter into the 1977 contract in the United States, or in this district, did not use the United States mails, phones or telegraph in forming the contract, and in general, does not have the requisite contacts with the district to sustain personal jurisdiction. ACME argues that MCP's chief executives used ACME's New York offices as their base of operations in connection with supervising ACME, MCP listed ACME's New York address as one of its overseas offices in an advertising brochure, established letters of credit in New York and effected payment through New York bank branches of Pakistani banks, and used United States phone and mails to communicate with its United States Agent, ACME.

These facts, discussed in the sections pertaining to subject matter jurisdiction and venue, *supra*, pp. 6-13, are relevant on the issue of personal jurisdiction. The Court concludes that MCP had a continuous and systematic presence in this district, and could have foreseen that it might be sued in this district. *See International Shoe Co.* v. *State of Washington*, 326 U.S.

310 (1945). Particularly with respect to the affiliation with ACME through a relationship comparable to, if not actually that of principal and agent, and use of the New York address of ACME for its own purposes, MCP has established contacts with the Southern District of New York well above the minimum required to support this Court's exercise of personal jurisdiction over MCP. *See Hanson* v. *Denckla*, 357 U.S. 235 (1958).

CONCLUSION

All three bases for MCP's assertion that this Court has no jurisdiction over it, and that venue is improper in this district, are without merit. The motion to dismiss is denied on all grounds. Defendant MCP is directed to file and serve its answer within 30 days of the date of this opinion and order. The parties shall appear for a status conference on April 22, 1986 at 4:00 p.m. in Courtroom 35 of the United States Courthouse, 40 Foley Square, New York City.

SO ORDERED.

Dated: New York, New York
February 28, 1986

/s/ JOHN F. KEENAN
John F. Keenan
U.S.D.J.

Judgment

85 Civ. 3765 (JFK)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AMERICAN CONSTRUCTION MACHINERY & EQUIPMENT CORPORATION LTD.,

Petitioner,

—v.—

MECHANISED CONSTRUCTION OF PAKISTAN, LTD.,

Respondent.

WHEREFORE Petitioner American Construction Machinery & Equipment Corporation Ltd. having commenced this action on May 17, 1985 to confirm pursuant to 9 U.S.C. § 207 the foreign arbitral award rendered on May 24, 1982 under the rules of the International Chamber of Commerce against Respondent Mechanised Construction of Pakistan Ltd. (the "Award"); and Petitioner having moved this Court to confirm said Award and to request the imposition of sanctions under Rule 11 of the Federal Rules of Civil Procedure upon Respondent; and the Court having by Opinion and Order dated March 23, 1987 confirmed the Award which directed Respondent to pay Petitioner: (a) $1,402,924.00 including interest up to December 21, 1981; (b) interest at the rate of 17% on that sum from December 22, 1981 until the date of payment; (c) arbitration costs of $45,057.57; and (d) Petitioner's legal costs calculated at $87,500.00; and the Court having further denied Petitioner's request for Rule 11 sanctions; and the Court having ordered that judgment shall so be entered, it is hereby

ORDERED, ADJUDGED AND DECREED that the Award is confirmed pursuant to 9 U.S.C. § 207 and that Petitioner have judgment against Respondent in the liquidated amount of $1,402,924.00, with interest at the rate of 17% from December 22, 1981 amounting to $1,258,480.82 as of April 1, 1987, plus arbitration costs in the amount of $45,057.57 and legal costs in the amount of $87,500.00, amounting in all as of April 1, 1987 to $2,793,962.39; and it is

FURTHER ORDERED, ADJUDGED AND DECREED that Petitioner's request for imposition of Rule 11 sanctions is denied.

Dated: New York, New York
April 6, 1987

/s/ JOHN F. KEENAN
U.S.D.J.